DISTURBANCE CATEGORIES AND THRESHOLDS

Section 3809.10 How Does BLM Classify Operations?

10.01 **Comment:** Proposed §3809.11(a) requires casual use disturbance to be "reclaimed." Which reclamation standards apply?

Response: We changed the requirement in final §3809.10(a) to include the word "reclamation," which is defined under §3809.5, rather than continue to use the phrase "you must reclaim" that appeared under proposed §3809.11(a). The definition of "reclamation" should clarify the standards that are to be met. Wording was added to final §3809.10(a) to clarify that if operations do not qualify as casual use, a Notice or Plan of Operations is required, whichever applies.

10.02 **Comment:** With no notification requirements, it is not clear how BLM will monitor casual use operations.

Response: We intend to monitor casual use operations in the course of our normal duties, but we agree with the comment and deleted the statement from proposed §3809.11(a).

Section 3809.11 When Do I Have to Submit a Plan of Operations?

10.03 **Comment:** Revise the table in proposed §3809.11 to avoid duplicating or summarizing the definitions in 3809.5 and to eliminate ambiguity. The table is difficult to follow.

Response: The table in proposed §3809.11 has been eliminated from the final rule. The information formerly in that table has been reorganized and edited and now appears under final §3809.11, §3809.21 and §3809.31.

10.04 **Comment:** Mining disturbance greater than casual use should require a Plan of Operations to be consistent with the National Research Council (NRC) report.

Response: This change was adopted into the final rule to comply with NRC (1999) report Recommendation 2.

10.05 **Comment:** The current casual use/notice/plan threshold is adequate and should be retained. The threshold protects the environment and reduces costs of exploration for operators.

Response: Retaining the above-described threshold would be inconsistent with NRC report Recommendation 2. Therefore, we did not adopt the comment.

10.06 **Comment:** Mining or milling operations, which will cause a significant impact, even if related to 5 acres or less, should be required to submit a plan of operations for approval.

Response: BLM has incorporated NRC (1999) report Recommendation 2 in our proposed final regulations to require Plans of Operations for all mining and milling.

10.07 **Comment:** The NRC report did not evaluate the adverse impact of Recommendation 2 on the vast majority of miners who have complied with existing regulations.

Response: We have incorporated NRC report Recommendation 2 into the proposed final regulations and have evaluated its impact in the final EIS.

10.08 **Comment:** NRC Recommendation 2 should not be supported because it would automatically exclude from Notices some operations that would not significantly affect the environment.

Response: Your comment is noted, but we have incorporated NRC's Recommendation 2 into the proposed final regulations

10.09 **Comment:** BLM should adopt the NRC Committee's recommendations that exploration be allowed under Notices, whereas mining would require Plans of Operations, but should leave further details to agency guidance. The criteria for distinguishing between "exploration" and "mining," may vary from state to state.

Response: We have incorporated NRC's Recommendation 2 into the proposed final regulations. Guidance on implementing the regulations will follow when the regulations become final.

10.10 **Comment:** BLM should not require all mining operations to be conducted under Plans of Operations, but should retain Notices for placer and lode mines that do not use toxic chemicals or create acid rock drainage.

Response: We note your comment but have incorporated NRC's Recommendation 2 into the proposed final regulations.

10.11 **Comment:** It is unnecessary to require Plans of Operations for mining in light of the proposed financial assurance requirements for Notices.

Response: We note your comment but have incorporated NRC's Recommendation 2 into the proposed final regulations.

10.12 **Comment:** Any activity requiring construction equipment or engineering design should need a Plan of Operations in light of the NRC report. Mechanized drilling equipment, off-

highway vehicles, and bulldozers should also require a Plan of Operations.

Response: We note your comment but have incorporated NRC's Recommendation 2 into the proposed final regulations.

10.13 **Comment:** Lowering the threshold for Notices or Plans of Operations seems to conflict with the 1970 Mining and Mineral Policy Act and the 1980 National Materials and Minerals Policy Research and Development Acts.

Response: We and the public operate under many conflicting laws. We believe we have balanced the mandate of FLPMA to prevent unnecessary or undue degradation of the public lands with the above-mentioned mineral policy acts that promote development of the Nation's mineral resources.

10.14 **Comment:** Some bulk sampling may cross the line from exploration to mining. Bulk sampling to remove less than 100 tons of material cannot be compared to bulk sampling that requires 10,000 tons for testing, which is the known range in size of such activities. While a bulk sample proposal under a Notice deserves scrutiny, the final determinations should be made on a case-by-case basis.

Response: BLM recognizes that bulk sampling is not easy to define. Bulk samples vary in many ways, including size and weight, as acknowledged in the NRC (1999) report. We have chosen a threshold at the upper limit of the NRC discussion on bulk sampling: 1,000 tons or more would trigger the requirement for a Plan of Operations. (See final §3809.11(b)). We believe that this limit implements NRC report Recommendation 2 in a way that does not unduly constrain exploration (see NRC report Recommendation 3) yet provides a clear cutoff that can be verified by BLM field people.

10.15 **Comment:** BLM should use caution in deciding whether to exclude bulk sampling from Notice-level operations. The NRC report (page 96) refers to activity that involves the "excavation of considerable amounts of overburden and waste rock" to get to layers where the bulk samples will be taken. Sampling of that nature gets to be so extensive as to require a Plan of Operations. Other activities that might nominally qualify as bulk sampling, such as ones that do not first remove large amounts of overburden, can properly be treated as exploration subject to the Notice-level program. Such sampling involves far less disturbance than the activities listed by NRC, and, in any event, the land from which the bulk samples are taken must still be reclaimed. For these reasons, in case of bulk sampling, BLM should focus not on the amount of earth sampled, but rather the sampling method.

Response: BLM recognizes that bulk sampling is not easy to define. Bulk samples vary in many ways, including size and weight, as the NRC (1999) report acknowledged. The report discussion on sampling clearly states that NRC believes not all sampling programs

would require a Plan of Operations, but that Plans of Operations would generally be required. In considering the NRC discussion, BLM does not believe that drilling should be considered a bulk sampling method because NRC characterized bulk samples as excavations from shallow open pits or small underground openings. We have chosen a threshold at the upper limit of the NRC discussion on bulk sampling, that is, bulk samples of 1,000 tons or more will trigger the requirement for a Plan of Operations. (See final §3809.11(b)). We believe this limit implements NRC report Recommendation 2 in a way that does not unduly constrain exploration (see NRC report Recommendation 3) yet provides a clear "cutoff" that can be verified by BLM field personnel.

10.16 **Comment:** BLM should revise the language that now appears in final §3809.11(c)(3) to state that an area of critical environmental concern (ACEC) triggers this provision only when the establishing of the ACEC considered and evaluated existing mineral rights and mineral potential.

Response: ACECs are designated through BLM's land use planning process and are subject to public comment before designation. This process allows the public to comment and BLM to consider and evaluate mineral potential and valid existing rights. The requirement for a Plan of Operations in ACECs would result in a more formal review and approval of mining or exploration, which would help assure better planning and protection of the resources for which the ACEC was established.

10.17 **Comment:** Most mining claims held by small miners are either within areas closed to off-road vehicles or within areas proposed to be closed to off-road vehicles. As such, almost all small miners will be required to prepare Plans of Operations for any level operation on their claims.

Response: The requirement is restricted to areas designated as "closed" to off-road vehicle use. It does not apply to proposed closures. This requirement remains unchanged from previous §3809 regulations in effect since 1981.

10.18 **Comment:** BLM should include riparian areas under proposed 3809.11(j), as in the Northwest Forest Plan.

Response: Using the new performance standards, including the protection of riparian areas and wetlands found in final §3809.420(b)(3), we believe that riparian areas will be adequately protected.

10.19 **Comment:** We oppose requiring a Plan of Operations for operations affecting proposed threatened and endangered species or designated critical habitat because of the uncertainty and delays to the permitting process and the additional workload required.

Response: We believe that the requirement to submit a Plan of Operations for surface

disturbance greater than casual use on any known lands or waters known to contain federally listed threatened and endangered species or their proposed or designated habitat is the best way to protect these species. Under §3809.11(c)(6) BLM can develop land use plans or endangered species recovery plans which might then allow Notices to be filed.

10.20 **Comment:** Delete the phrase "unique, irreplaceable, or outstanding historical, cultural, recreational, or natural resource values" from proposed §3809.11(j)(6), since this phrase may be too subjective and any public lands could meet these criteria. Some commenters believe that defining "special status areas" by those criteria would establish ad hoc designations of ACECs as to mining without following the procedures of 43 CFR 1610.7-2. Delete the term "activity plans."

Response: We have deleted these phrases from the final rule for several reasons. First, we modified the definition of unnecessary or undue degradation in final §3809.5 to include conditions, activities, or practices that result in substantial irreparable and unmitigatable harm to significant scientific, cultural, or environmental resources of the public lands. Second, we retained language specific to threatened or endangered species in recognition of the consultation requirements of the Endangered Species Act. We believe that these modifications have the same net effect as the language in proposed §3809.11(j)(6).

10.21 **Comment:** The term "special status areas" (used in final §3809.11(c)) is very broad, and would effectively remove many areas from exploration. The term expands BLM authority to create such areas.

Response: The term is not meant to impart any distinctive meaning on its own; it is simply a general reference to the types of lands listed in that section. The listed lands have already been established under separate laws and are not affected by the regulations.

10.22 **Comment:** Proposed 3809.11(j)(6) is too narrow an approach under BLM's responsibility to prevent unnecessary or undue degradation, and to protect affected resources BLM must retain authority to require Plans of Operations.

Response: We have deleted §3809.11(j)(6) from the final rule for several reasons. (See §3809.11 for what would require a Plan of Operations.) First, we modified the definition of unnecessary or undue degradation in final §3809.5 to include conditions, activities, or practices that result in substantial irreparable and unmitigatable harm to significant scientific, cultural, or environmental resources of the public lands that cannot be effectively mitigated. Second, we retained language specific to threatened or endangered species in recognition of the consultation requirements of the Endangered Species Act. We believe that these modifications have the same net effect as the language in proposed §3809.11(j)(6).

10.23 **Comment:** Proposed §3809.11(e) is too vague on when a Notice or Plan of Operations would be required for group recreational mining. Recreational and mineral collecting

groups should not be singled out and have to submit a Notice or a Plan of Operations. It is an unreasonable requirement and, in some cases, mineral-collecting groups could not afford the financial guarantees, which they feel are unnecessary for those who use only hand tools. BLM should not recognize such activities under the mining laws.

Response: We have deleted §3809.11(e) from the final rule. Provisions for when a Notice or Plan of Operations would need to be submitted that would affect recreational and mineral collecting groups can be found in the final rule, §3809.31(a). The changes in §3809.31(a) provide more clarification as to when a Notice or Plan of Operations would be required.

10.24 **Comment:** Proposed §3809.11(f) will eliminate flexibility when requiring Plans of Operations for uses described in that section.

Response: We deleted proposed §3809.11(f) but in order not to be inconsistent with NRC Recommendation 2, we retained in the final rules the provision requiring a Plan of Operations for mining and milling operations.

§3809.11 "Forest Service" Alternative

10.25 **Comment:** BLM received a variety of comments on the Forest Service alternative in the proposed regulation. They are as follows: The Forest Service alternative would provide a consistent approach to federal agency administration of the Mining Law. The surface resources on BLM public lands deserve the same level of protection as do the national forest lands. Adoption of the Forest Service alternative would be less confusing in those mineralized areas that occur on both BLM lands and in national forests. The Forest Service alternative compares favorably to proposed §3809.11 (Alternative 1) because of a perception that the Forest Service alternative would provide greater protection to non-special status areas, that is, those areas not listed in proposed §3809.11(j). BLM did not provide a meaningful basis for reasoned comment on this issue. The Forest Service alternative has an advantage because it places the burden of deciding whether a Notice or Plan is needed on the government as opposed to the operator. The significant disturbance standard of the Forest Service alternative would be too vague, too open to varying interpretations, create uncertainty as to which operations it would apply, and create significant potential for disagreement between the operator and BLM over whether a planned operation would create significant disturbance. The significant disturbance standard of the Forest Service alternative goes beyond FLPMA's statutory directive to prevent unnecessary or undue degradation. Adoption of the Forest Service alternative would eliminate the use of Notices for small exploration operations. If so, business would be adversely affected. Eliminating Notices for placer mining in Alaska would create a hardship for small miners, who couldn't meet the requirements for filing a proposed Plan of Operations. The Forest Service alternative would consume more of BLM's already thinly spread resources, potentially causing administrative delays and increase costs due to

NEPA compliance requirements.

Response: Congress has required BLM not be inconsistent with the NRC (1999) report. This report recommends that exploration disturbing less than 5 acres be allowed under Notice-level activity.

Section 3809.21 When Do I Have to Submit a Notice?

10.26 **Comment:** Small operators count on the 5-acre exclusion for rapid yet responsible evaluation of many projects to make its discovery. Such operators may not have the finances for lengthy permit procedures and time delays, as do major mining companies. Without the 5 acre threshold, future exploration would be conducted almost exclusively by the largest of the mining companies.

Response: The 5-acre threshold for submitting a Notice has been retained for exploration activities of 5 acres or less.

10.27 **Comment:** Define "unreclaimed" as used in proposed §3809.11(b) and proposed §3809.11(c). BLM should not regard the Notice threshold as "unreclaimed surface disturbance of 5 acres or less."

Response: We have changed the term "unreclaimed surface disturbance of 5 acres or less" in §3809.21(a)(1) to clarify the requirement. By specifying "public lands on which reclamation has not been completed," we expressly intend to use the term "reclamation" as defined in final §3809.5. This means that reclamation must meet performance standards in final §3809.420, and BLM must accept such reclamation before releasing a financial guarantee. Once reclamation has been completed to these standards, we believe that such lands may be treated as if never disturbed when considered in a Notice submittal.

10.28 **Comment:** Clarify under proposed §3809.11(b) how an operator is responsible to reclaim the previous disturbance by another operator.

Response: As with proposed §3809.11(b) and (c), and the final rule, the operator is liable for prior reclamation obligations in a project area if conditions described under final § 3809.116 are met. Operators who believe that BLM should not hold them responsible for past reclamation obligations should contact BLM before causing more surface disturbance. BLM could then advise them as to whether it is taking any action against previous operators or mining claimants at the disturbed site.

10.29 **Comment:** Revise proposed §3809.11(b) to retain the existing requirement for BLM to act within 15 calendar days. Extending the review period to 15 business days would delay exploration. Operators need flexibility and speed for Notice-level exploration projects, and that timing of exploration activities is often critical. Streamline the processing of Notices

as much as possible and avoid delays. Streamlining the process would be consistent with the NRC report.

Response: We changed the final rule to use calendar days rather than business days in response to public comments and the NRC (1999) report recommendations to minimize impacts on exploration and small operators.

10.30 **Comment:** Clarify what is meant by "business days" since government business days do not coincide with industry business days.

Response: We changed the final rule to use calendar days rather than business days in response to public comments and the NRC report recommendations to minimize impacts on exploration and small operators.

10.31 **Comment:** In the proposed rule the 15-business-day review period given BLM to review Notices is too short to ensure adequate investigation by the agency. We suggest 30 days.

Response: We did not implement this suggestion. Instead, we changed the final rule to use calendar days rather than business days in response to public comments and the NRC report recommendations to minimize impacts on exploration and small operators.

Section 3809.31 Special Situations That Affect Submittals Before Conducting Operations

10.32 **Comment:** Suction dredges with intake diameter of 8 to 4 inches or less should be considered casual use and not require a Notice or a Plan of Operations. It is not clear how BLM determined the 4" intake threshold. BLM should adopt state requirements, including intake size and not be more stringent than the State. It appears that the proposed rule requires a Notice or Plan of Operations for any dredging activity, regardless of how insignificant. Replace the 4" nozzle threshold with language that identifies surface-disturbing activities as the threshold for Notice level use. High-value fish and wildlife habitats could be harmed by a 4" suction dredge intake. Require standards for suction dredging concerning cumulative impacts and stream status. BLM should consider a broader range of values that could be affected when assessing whether to regulate portable suction dredges under 4 inches in diameter. Suction dredge operators should, at a minimum, be required to obtain an individual National Pollution Discharge Elimination System (NPDES) permit. Avoid the contradiction that small suction dredges are not considered casual use yet do not follow requirements for Notices or Plans of Operations. BLM should define small dredges as recreational or casual use and not require bonding or Notices unless the operators have a record of causing problems or noncompliance. The National Research Council does not wish small-scale dredging operations, those that use a nozzle size of 8 inches or less, to be categorized as a mining operation. Very small industrial mineral mines or placer operations (other than the small dredges discussed above) that use only simple sorting methods should not automatically be required to

submit Plans of Operations. Such determinations should be made on a case-by-case basis. The language in proposed §3809.11(h) would conflict with Recommendation 2 of the NRC report. Suction-dredging is properly managed under state or local authority. If the proposed rule is finalized, the proposed alternative that would allow an operator to use any suction dredge if it was regulated by the state and the state and BLM have an agreement to that effect should be adopted as the least burdensome alternative.

Response: We deleted the reference in proposed §3809.11(h) to an "intake diameter of 4 inches or less." We retained language that relies on state regulation. When the state requires an authorization for the use of suction dredges and BLM and the state have an agreement under final §3809.200 addressing suction dredging, we will not require a Notice or Plan of Operations unless otherwise required by this section. In addition, we added clarifying language and cross-references under final §3809.31(b)(1) and §3809.31(b)(2). Given the NRC report discussion that endorses the way BLM regulates suction dredging, we believe that the NRC did not intend in its Recommendation 2 to require Plans of Operations for suction dredging. The rule will allow most suction dredging to be regulated by state regulatory agencies as long as they have a permitting program that is the subject of an agreement with BLM under final §3809.200. Therefore, we find that final §3809.31(b) is not inconsistent with Recommendation 2 of the NRC report.

10.33 **Comment:** Since suction dredging takes place in rivers and streams and not on the land, it should be under state authority and regulation, not BLM regulation.

Response: We generally agree that it is appropriate for states to regulate activities within navigable waters. Even in such cases, BLM believes it has the authority to protect the public lands above high water mark where there may be adjacent, related operations. But in many cases, there has been no such determination of navigability for rivers and streams on public lands. In these instances, BLM has clear authority to regulate the operations. We believe we have provided for proper state regulation of suction dredging in final §3809.31(b).

Operations Conducted Under Notices

10.34 **Comment:** Clarify in §3809.300(a) that all Notices will expire after 2 years and then the final rules will apply.

Response: The final rule has been modified to clarify the intent of the section.

10.35 **Comment:** Use a tax identification number instead of a social security number in the operator information required under proposed §3809.301(b)(1).

Response: We agree and have made that change in the proposed final regulations, as well

as under final §3809.401(b)(1).

10.36 **Comment:** Notice content requirements should not include the dates that operations will begin and when reclamation will be completed, since these are never exactly known.

Response: We agree and have changed final §3809.301(b)(2)(iv) accordingly by asking for the expected dates that operations will begin and reclamation will be completed. We have also specified "calendar" days under final §3809.301(d) for clarity.

10.37 **Comment:** Add a requirement to §3809.301(b), §3809.312, and §3809.313 for an operator to advertise planned operations in a local newspaper, not beginning operations until 30 days after publication. This time would allow the public to file written objections.

Response: We did not adopt this comment since we believe that this suggestion would conflict with NRC report Recommendation 3 dealing with expeditious handling of exploration.

10.38 **Comment:** Add to §3809.311 language that allows any person with an adversely affected interest to file written objections to a Notice within 30 days of advertising planned operations.

Response: We did not adopt this suggestion because we believe that it would conflict with NRC report Recommendation 3 on expeditious handling of exploration .

10.39 **Comment:** Operators should not have to provide a reclamation cost estimate under proposed 3809.301(b)(4) because BLM would review and modify a reclamation plan in most cases.

Response: We do not agree with this comment and have not adopted the suggested change. The burden should be on operators, who are the proponent of the activities requiring reclamation, to give their best estimate of reclamation costs.

10.40 **Comment:** BLM should review Notices for completeness in time frames ranging from 5 calendar days to 20 business days.

Response: We have rejected this suggestion because we believe the 15 calendar day review period should include a completeness review. If BLM staff determines that a Notice is incomplete in less time, we will notify the operator as soon as possible.

10.41 **Comment:** Clarify the standards BLM will use to see if a Notice is complete under 3809.311(a).

Response: The standards for completeness are listed in final §3809.301.

10.42 **Comment:** The State Game and Fish Department would like to review proposals, regardless of acreage, where there is concern about fish and wildlife resources, or limited, high-value wildlife habitats such as riparian zones and wetland habitats.

Response: During the Notice-review process BLM will make every effort to coordinate with state regulators. This coordination will likely happen through state/federal agreements, such as described under final §3809.200.

Section 3809.312 When May I Begin Operations After Filing a Complete Notice?

10.43 **Comment:** BLM should be required to inform the operator when a Notice is complete and operations can begin.

Response: This comment has not been incorporated in the final rule. The Notice system is designed to allow an operator to begin operating if not notified by BLM of its concerns about compliance with this rule.

10.44 **Comment:** New §3809.312(e) should be added that would notify operators that they may be subject to more requirements imposed by state regulation and that operators must be in compliance with such requirements before beginning operations.

Response: The comment was not adopted. This requirement is already covered under §3809.5, under the definition of unnecessary or undue degradation. See also final §3809.3. In addition, state law applies by its own terms.

10.45 **Comment:** The 15-business-day time frame proposed for Notice review would not be realistic since an operator would be required to provide a financial guarantee before beginning operations.

Response: In practice, an operator would need to obtain a financial guarantee before or soon after filing a complete Notice in order to begin operations 15 days later.

10.46 **Comment:** Notice-level operations should not be required to furnish financial guarantees, as required under proposed 3809.312(c), if no cyanide or leaching is proposed.

Response: The requirement for a financial assurance beyond casual use has been left in the final rules so as not to be inconsistent with NRC report Recommendation 1.

10.47 **Comment:** BLM would be able to extend the 15-business-day review period for a Notice indefinitely under proposed 3809.313 due to the ambiguous, proposed language of that section.

Response: Under §3809.313(a), the final rule allows BLM to extend the review period by 15 more calendar days. Specific time frames were not included in §3809.313(b), (c), and (d), because it could take longer to resolve BLM concerns.

Section 3809.330 May I Modify My Notice?

10.48 **Comment:** Proposed § 3809.330 does not define how an incomplete Notice modification affects the existing Notice.

Response: Final §3809.330(b) states that modified Notices will be handled under the procedures of final §3809.311, which addresses incomplete Notices. You may not proceed with the modified Notice until it is complete and BLM has reviewed it.

Section 3809.331 Under What Conditions Must I Modify My Notice?

10.49 **Comment:** It is unclear how §3809.331(a)(1) would apply to private lands.

Response: §3809.331(a)(1) applies to modifications of Notices involving public lands. It has nothing to do with private lands.

10.50 **Comment:** 24000.50: It is unclear how much time BLM would give an operator to comply with §3809.331(a)(1) if BLM requires modification of a Notice.

Response: The length of time that BLM requires to modify a Notice will depend on site-specific conditions. The time requirements will be spelled out in an appealable decision letter sent to the operator from the BLM.

10.51 **Comment:** BLM should revise proposed 3809.331(a)(1) to require documentation of unnecessary or undue degradation that BLM had found.

Response: Normal case processing in BLM includes documenting our findings in case files. This documentation ensures a good written record upon which the local BLM manager can base decisions and findings. These findings and decisions on unnecessary or undue degradation would be included in an appealable decision letter sent by BLM to the operator and requiring modification of the Notice.

Section 3809.332 How Long Does My Notice Remain in Effect?

10.52 **Comment:** Two years is a reasonable period for a Notice to be effective, but the responsibility for operators to reclaim operations should be independent of the validity of the affected mining claims.

Response: The 2-year period addressed in final rule §3809.332 makes no mention of the

validity of the affected mining claims. Operators continue to be responsible for reclamation of their disturbances after expiration of a Notice or abandonment of a mining claim.

10.53 **Comment:** Notices should expire in 4 to 5 years.

Response: Operators may file extensions under final §3809.333 to keep their Notices and our records current. Additional extensions are allowed.

10.54 **Comment:** BLM has not shown that an inability to clear expired Notice records has resulted in unnecessary or undue degradation and that it would be inappropriate to clear records since reclamation may not be completed for a considerable time in the future at a project area.

Response: This provision remains in the final rule because it will help BLM clear its records of Notices where no activity has occurred or Notices that have remained inactive for long periods since operations began. Reclamation obligations will continue for the operator until completed, regardless of the disposition of the Notice.

Section 3809.333 May I Extend My Notice, and, if so, How?

10.55 **Comment:** Clarify that Notices would be extended only if there is an acceptable financial guarantee as provided under §3809.503.

Response: We have incorporated a reference to §3809.503 to this subsection of the final rule.

10.56 **Comment:** The 2-year time frame for Notice extension is adequate. The 2-year time frame for Notice extension is too short. Notice extensions should not be required if operations do not change.

Response: Operators may file extensions under final §3809.333 to keep their Notices and our records current. Additional extensions are allowed..

10.57 **Comment:** Clarify that the only reason a Notice extension might not ensue is in the instance of noncompliance, and in such a case BLM would notify the operator.

Response: We anticipate that only operators in good standing with the regulations will be able to extend Notices. BLM will inform operators of the reasons for the noncompliance and steps needed to correct it.

10.58 **Comment:** Add language to §3809.330(a) and to §3809.333 to require public notification for Notice modifications and extensions.

Response: We believe that adding such public notification requirements would be inconsistent with NRC report Recommendation 3.

Section 3809.334 What if I Temporarily Stop Conducting Operations Under a Notice?

10.59 **Comment:** BLM should provide written documentation of any finding under proposed 3809.334(b) that temporary cessation of operations will likely cause unnecessary or undue degradation.

Response: BLM's findings, on a case-by-case basis, will be spelled out in an appealable decision letter sent to the operator from BLM.

10.60 **Comment:** §3809.334 inadequately addresses unnecessary or undue degradation caused by improper storage and containment of hazardous materials and remediation of contaminated soils.

Response: We believe that the performance standards applicable under §3809.320 as well as the continued requirement to prevent unnecessary or undue degradation adequately address these concerns.

10.61 **Comment:** Define "period of time" as used in §3809.334(a) and "extended period of non-operation" as used in §3809.334(b)(2).

Response: Regardless of the "period of time" that passes, at all times an operator must meet the requirements of §3809.334(a). BLM will take actions needed to ensure the prevention of unnecessary or undue degradation. BLM will determine the term of an "extended period of non-operation" on a case-by-case basis after considering the sensitivity of the resources in the project area.

Section 3809.335 What Happens When My Notice Expires?

10.62 **Comment:** A third option should be added to §3809.335(a) to allow an operator to give written Notice to BLM of the intent to extend the Notice per §3809.333. If an operator misses the extension deadline but intends to operate, he/she should not be forced to reclaim.

Response: Operators who face this situation would not be in compliance with §3809.333, which requires they notify BLM in writing on or before the expiration date of their desire to conduct operations for 2 additional years. We wrote §3809.333 in this way in order to avoid long periods of time after a Notice expires for reclamation to be completed, and to prevent unnecessary or undue degradation from occurring. If a Notice expires, §3809.335(a) ensures that reclamation is promptly completed. If an operator

inadvertently misses a Notice-extension deadline, he/she must immediately submit a new Notice and provide adequate financial guarantee as required under §3809.301, then follow §3809.312. Quick submittal of a new Notice will ensure the prevention of unnecessary or undue degradation and continuity of operations.

Section 3809.336 What if I Abandon My Notice-Level Operations?

10.63 **Comment:** Since exploration is typically intermittent, Notice-level operations may appear to be "abandoned" at some time during the 2-year Notice term.

Response: We have included in §3809.336 criteria to inform the public of indicators of abandonment. BLM will strive to contact operators where it is not clear whether operations have been abandoned. Our major concerns are the prevention of unnecessary or undue degradation and that operators maintain public lands within the project area, including structures, in a safe and clean condition.

10.64 **Comment:** Revise §3809.336(a) to require BLM to provide an appealable determination that the project area has been abandoned.

Response: Any written decision that BLM sends to an operator may be appealed as outlined under §3809.800.

PLANS OF OPERATIONS

Existing/Pending Plans of Operations

11.01 **Comment:** 3809.400(b) "BLM made an EA...available to the public...": Does this include EAs that are on file at a BLM office and therefore "available" as public information, or are the regs referring to public notification in a more formal sense (i.e. interested parties receiving notification by mail or internet)? Also, does the EA need to be FONSI'd, final or preliminary? These issues should be clarified so that the new regs can be implemented more consistently. The proposed rule should delete the unfair NEPA document publication requirement trigger to grandfather proposed Plan of Operations.

Response: §3809.400(b) was attempting to clarify the dates when the final rules would become effective where Plans are pending awaiting the completion of an environmental assessment (EA) or EIS. The final §3809.400(b) has been revised and no longer refers to pending EAs or EISs in determining effective dates of the final rules on pending plans. If the Plan of Operations were submitted before the effective date of the final regulations, then it falls under the old plan content and performance standard requirements.

11.02 **Comment:** All existing Notices or Plans of Operations should be grandfathered if they put the new regulations in place unless the mining materially changes from what was proposed and approved in the Notice or Plan.

Response: The final rules provide that all existing approved Plans of Operations, and Plans of Operations pending on the effective date, would be grandfathered from the Plan content requirements and the performance standards. All other portions of the regulations such as bonding and enforcement would still apply. Material changes (modifications) would be subject to the new regulations where practical as described in §3809.433.

11.03 **Comment:** 3809.400. Please define what you consider to be a modification This should be listed in the definitions. No cut-off date should exist since the operator is committing capital. Under set assumptions, it's defined by the performance standards, and this would deter anyone in this project, or the new rules could force his financial position into a riskier state. In other words, he could not be able to fill it.

Response: A modification, as used in section 3809.432, is a change in a Plan of Operations that requires some level of review by BLM because it exceeds what was described in the approved Plan of Operations. We have added this definition to the Glossary of the final EIS.

11.04 **Comment:** For this rulemaking, the regulations in effect when a Plan of Operations is submitted must govern. If BLM proceeds with this rulemaking, the final rule must clarify that the new rules do not apply to any pending Plan of Operations and that the date of

submission of the Plan determines which rules will apply. The agency can, however, draw some line, in a final rule, on the completeness or competence of the Plan pending at the time of the final rule in order to prevent BLM from being required to exempt from the new rules incomplete or obviously inadequate Plan s submitted solely for the purpose of preventing application of the rule changes. At the same time, a fully developed Plan (that covers all necessary facilities and addresses the major permitting statutes and issues) is itself a significant investment of technical expertise, time and money. It is not prepared and submitted to beat a deadline; it is submitted in a good faith effort to comply with existing regulations. The operator may expect that there will be changes in the Plan between submission and approval, based on agency review, public comment, or the actions of other environmental permitting entities. At the same time, however, BLM cannot reasonably expect the operator to design the initial Plan , or Plan modification, to meet the conditions of rules that are not yet in effect, or in the alternative, completely reconstruct a proposed Plan because new rules have been subsequently finalized.

Response: The final regulations provide for the effective date of the final regulations to determine which performance standards and Plan content requirements apply to a Plan of Operations. But BLM would require for a Plan to be grandfathered, that it be substantially complete before the effective date of the regulations. This means that the Plan if grandfathered under the old regulations must have reasonably met the content requirements of the old regulations by the date the new regulations go into effect.

11.05 **Comment:** Section 3809.400(b) must be amended to state clearly that if an operator files a Plan of Operations before the effective date of the new regulations, then none of the new regulations apply. Making filing the cutoff point for applications is appropriate. First, a Plan of Operations typically entails the expenditure of substantial sums of money, time and effort. Requiring a new Plan of Operations to be developed under any promulgated new regulatory regime merely because BLM has not approved the Plan of Operations is an inappropriate and unnecessary burden on the claimant. Second, it is only fair to the operator that the Plan of Operations be reviewed, evaluated and implemented under the rules in place at the time of the filing, rather than requiring the operator to refile the Plan . Third, this test is easier for BLM to administer because it requires BLM to look no further than the filing date to determine what criteria apply as opposed to the proposed rule, which has different levels of applicability depending on whether BLM has made an environmental assessment or draft environmental impact statement available to the public before the effective date of the regulations. If a particular District Office has the adequate staff to push a project through the schedule and publish an EA or EIS before implementation of the revised rules. BLM's proposal is arbitrary in that an entity issued an EA or Draft EIS the day before the regulations are effective would be able to operate under its proposal whereas a similar project which missed the deadline by a few days would be required to conform to the new requirements. An operator should not be penalized due to delays largely or solely within BLM's control, whether warranted or not. The grandfather or exemption threshold should respect the claimant-operator's

"considerable time and resources towards developing the Plan ".

Response: BLM has changed the final rules to provide for a substantially complete Plan to be processed under the regulations that were in effect when it was submitted to BLM. BLM agrees this would be more fair to the operator and easier to administer. But existing or pending Plans of Operations would still be subject to the administrative provisions of the new regulations such as financial assurance for reclamation, or enforcement.

11.06 **Comment:** The approach of not grandfathering pending Plans filed before the effective filing date is inconsistent with Section 3809.332, which uses the effective date of the final rule as the date upon which an existing Notice will begin its 2-year term under the proposed final regulations.

Response: The reason for this difference in the proposed final regulations is that Notices are typically for activities of smaller scale and shorter duration than are Plans of Operations. Therefore, the consequences of grandfathering existing Notices is not as great as it is for Plans. With the changes to the proposed final regulations, pending Plans of Operations would also be grandfathered in addition to notices.

11.07 **Comment:** Unless the Department of the Interior has a request from the mining industry, .400(d) should be deleted. It is unlikely that an owner/operator would voluntarily submit to the more costly and more time-consuming provisions of the proposed revisions of the existing 3809 regulations.

Response: Section 3809.400(d) is a voluntary provision and has been retained. An operator may want certification that their operations are in compliance with the new regulations, even where not required, for insurance or marketing purposes.

11.08 **Comment:** 400(a) This entire section is not consistent with the NRC study findings and Recommendations, especially Recommendations 9,11,15 and 16.

Response: BLM does not see any inconsistency in the final regulations with the NRC study. NRC did not even address how existing or pending Plans of Operations should transition with any changes in the regulations. But the final rules do provide for exemption from the new performance standards and Plan content requirements for existing and pending Plans of Operations. This is certainly consistent with the NRC comments at various places in the report that procedures be fair and reasonable to operators and protect the interests of the mining company in continuing to conduct operations.

11.09 **Comment:** Under this proposal, an environmental assessment or draft EIS could be substantially complete based on the current content requirements, at significant expenditure of time and money, and without public review, would need to be completely redone to reflect the new content requirements and performance standards.

Response: The extent to which individual Plans would have to be redone under the proposed final regulations is highly site specific. BLM has changed the proposed final regulations to grandfather existing and pending Plans of Operations submitted to BLM before the effective date of the final regulations from the performance standards and Plan content requirements. This change would prevent the situation of having to redo significant expenditures on an EA or draft EIS.

11.10 **Comment:** Proposed 3809.400(a) provides that all of the proposed final regulations, except the performance standards in proposed 3809.420, would apply to Plans of Operations approved before the effective date of the regulations. Operations under such approved Plans of Operations should continue pursuant to the current regulations. Otherwise, for example, such operations would be subject to whatever new definitions of "unnecessary or undue degradation" that may be adopted (see Proposed 3809.1).

Response: Part of the "terms and conditions" in the final regulations under which approved Plans of Operations would continue to operate, include the definition of unnecessary or undue degradation that was in effect when the Plan of Operations was approved. Plans of Operations that are grandfathered from the new performance standards would not be subject to the new definition of unnecessary or undue degradation.

11.11 **Comment:** Under the proposed rule 3809.400(b) , a proposed Plan of Operations or proposed modification to a facility submitted before the final rule takes effect would be subject to the revised 3809 program requirements unless BLM had released an environmental assessment (EA) or draft EIS on the proposed Plan before the rule's effective date. This approach is simply unfair given BLM's usual Plan approval process. Operators typically wait between eighteen months and two years for BLM to make public a draft EIS or EA. If an operator has expended significant funds determining whether a planned operation (or modification) is feasible under the current rules and preparing a Plan accordingly, it should not be compelled to go back to the drawing board two years later simply because BLM has taken an inordinate amount of time to review the Plan . Indeed, even if a revised Plan were later put together and resubmitted to BLM, the operator would have to wait another three to five years for BLM approval. There can be no doubt that operators spend considerable sums preparing Plans of Operations, including Plans to modify facilities. As we explained in our comments on BLM's Paperwork Reduction Act submission to the Office of Management and Budget, under the existing regulations it takes an average of 2,748 person hours to prepare a Plan of Operations. Those hours involve the services of scores of professionals and thus require enormous expenditures. For example, Newmont Gold typically spends between $150,000 and $200,000 preparing a medium-sized Plan of Operations under the existing regulations. There is simply no justification for making operators restart the process and reincur such large expenses.

Response: BLM has been persuaded by these and other arguments on the cutoff date for

exempting pending operations from portions of the regulations. The final regulations provide for operations that have submitted a proposed Plan of Operations to BLM by the effective date of the new regulations to operate under the Plan content and performance standards of the old regulations.

11.12 **Comment:** Keeping in mind BLM's preference for a process-based test, Newmont Gold suggests that BLM grandfather all proposed Plans of Operations and proposed modifications pending with BLM on the date the rule becomes final. This will not amount to very many Plans. According to the draft EIS, about 200 Plans of Operations are submitted each year. Assuming BLM's conclusion of 18 months from Plan submittal to a final EIS, a draft EIS should take at most 12 months. Thus, if BLM lives up to assertions, at most 200 Plans without draft EISs might be pending when the rule is finalized. This amount compares with about 1000 Plan-level operations now on the public lands. Grandfathering these 200 Plans would not, we submit, result in any undue impacts to the public lands–particularly since there has never been any showing by BLM that the current regulations are inadequate to protect the public lands. And to ensure that operators do not take unfair advantage of such a rule, BLM could specify that applications that are incomplete on their face would not be grandfathered.

Response: BLM has been persuaded by these and other arguments about the cutoff date for exempting pending operations from portions of the regulations. The final regulations allow operations that have submitted a substantially complete proposed Plan of Operations to BLM by the effective date of the new regulations to operate under the Plan content and performance standards of the old regulations.

11.13 **Comment:** Section 3809.400. Proposed rules should not apply to existing or pending Plans of Operations or modifications to such Plans. The proposed rules should not apply to existing or pending Plans of Operations or modifications to such Plans. Mining companies object to any retroactive application of the proposed rules. If it proceeds to finalize the proposed rulemaking despite the extensive opposition, BLM must clearly specify that where an operator has filed a Plan of Operations before the effective date of the regulations, the operation and Plan are subject to the existing subpart 3809 rules. This is particularly important where BLM already has pending Plans of Operations on file for approval. BLM's delay in processing such Plans or accompanying NEPA documentation should not penalize the operator.

Response: BLM has changed the proposed rule as suggested to specify that where a Plan of Operations or modification is pending on the effective date of the final regulations, that Plan would fall under the old Plan content requirements and performance standards, including the old definition of unnecessary or undue degradation. But BLM believes it is necessary that the new regulations on other administrative provisions such as bonding and enforcement apply to all existing and future operations and that future modifications incorporate the new performance standards to the degree practical as described in the

proposed final regulations 3809.433.

11.14 **Comment:** The fundamental changes being proposed by BLM could trigger significant added investment so that the Plan of Operations would conform to the revisions. The revisions may prompt fundamental project design changes and the need to submit substantially more information. Since the burden of the added requirements ultimately rests on the operator, not BLM; the operator should be able to face the prospects of those requirements with some degree of certainty.

Response: The proposed final regulations do not require operators with pending Plans of Operations to submit more information to conform to the rules if they had submitted their Plan of Operations to BLM before the effective date of the final regulations.

3809.401-Operator Information

11.15 **Comment:** The rules must state clearly that the substitution of owners/operators in connection with a Plan of Operations, no matter where in the process the Plan is (whether pending, approved subject to pending modification, or fully approved), does not bring into play the transition rules. It is a nonevent for purposes of grandfathering and transition. The only issues relevant to the change of operator when mines are sold or operators are changed is the determination that the new owner or operator is covered by the same or a substituted financial assurance.

Response: BLM agrees with the comment that substitution of owners and/or operators in connection with a Plan of Operations, no matter where in the process the Plan is (whether pending, approved subject to pending modification, or fully approved), does not bring into play the transition rules for Plans of Operations. BLM does not believe the regulations need to specify all conditions under which they do not apply, just those under which they would apply.

11.16 **Comment:** Under existing Nevada laws and regulations, operators collect all the information required by proposed 3809.401. As mentioned, such information is available to BLM for review during the NEPA process. Thus, the most that most of the proposed new application requirements would accomplish is to compel operators to expend significant sums gathering such materials earlier than they do today, and then later having to amend and repackage the materials as the NEPA process moves forward. BLM could save resources for other activities by eliminating its proposal to increase the amount of information operators must submit with plans of operation.

Response: While the regulations are more specific on the information BLM requires, it is not much different from information many offices have been requiring under the existing regulations. BLM needs this information for evaluating the Plan of Operations to determine whether operations would cause unnecessary or undue degradation, and to

conduct the environmental analysis required by NEPA. Since the information is not required in any particular format, applications prepared to meet state requirements could be submitted to BLM to satisfy the pertinent information requirements in section 3809.401. The timing of the submission of this material could be worked out on a case-by-case basis, but the material would have to be provided early enough to support the Plan review and NEPA analysis processes.

11.17 **Comment:** There is no compelling need for BLM to obtain this volume and detail of information at the beginning of its review process. Detailed engineering, management, and monitoring plans are not essential to the NEPA analysis, particularly during its initial scoping stages. Indeed, until BLM is fairly far along in the NEPA process, it cannot even accurately gauge whether such detailed plans are in fact adequate. The final test of what is or is not required and the level of detail can be finalized only after scoping has been completed. In short, front loading the process will at best produce preliminary information that would be of little value to BLM. In contrast, by submitting such information later, operators need to make extensive and costly changes to Plan s in light of knowledge gained during the NEPA process.

Response: The purpose of the information requirements is to obtain a Plan of Operations that describes what the operator proposes to do in enough detail for BLM to evaluate impacts and determine if the Plan will prevent unnecessary or undue degradation. The required level of detail will vary greatly by both type of activity proposed and environmental resources in the project area. On large EIS-level projects scoping may actually start before a Plan of Operations is submitted through discussions with BLM staff on the issues and level of detail expected. A certain level of detail is required to begin public scoping. In the initial Plan submission the operator must determine what level of detail to include in the Plan. BLM will then advise the operator if more detail is required, concurrent with conducting the NEPA scoping process. By conducting the NEPA issue identification process (scoping) concurrent with the Plan completeness review, both BLM and the operator can determine the proper level of detail for the Plan of Operations.

11.18 **Comment:** Plans of Operations 3809.401(b) require operators or mining claimants to "demonstrate that the proposed operations would not result in unnecessary or undue degradation of public lands." This required demonstration should be eliminated because it shifts a burden to the operator to establish a negative. Coupled with the circular definition of unnecessary or undue degradation in 3809.5, the burden is impossible to carry. The proposed regulations conflict with FLPMA, 43 USC 1732(b). Under the current regime, the "prudent operator" standard is an objective test that reconciles the right to mine under the mining laws with the requirement to avoid unnecessary or undue degradation under FLPMA.. This assertion of a burden to be placed on operators, along with BLM's assertion earlier that it has discretion to deny Plans that do not prevent unnecessary or undue degradation, is inconsistent with the statutory rights granted under the Mining Law. The proposed rules abandon that objective standard in favor of a very subjective, even

arbitrary standard. The new standard is simply the requirement of every operator to comply with whatever BLM imposes under these proposed regulations. This language will allow any reviewing official to stonewall an operation until the claimant is forced to give up. Small operations cannot afford to hire environmental analysts or other professionals to soothe every concern that a reviewing official can come up with.

Response: This section merely articulates the current requirements. It has always been incumbent upon the operator to produce a Plan that prevents unnecessary or undue degradation. The Mining Law never provided for degradation beyond that necessary for mining purposes. The operator does not have to prove a negative, but rather produce a Plan of Operations that BLM believes would be successful in preventing unnecessary or undue degradation of the public lands. This sentence has been moved in the proposed final rule to section 3809.401(a) to describe the overall standard of review BLM will require a Plan to meet in order to be approved.

11.19 **Comment:** 3809.401 (b). Under what criteria should the operator be required to establish the practices? The operator should be allowed to use standard engineering practices. The operator and BLM should use only proven technology, that technology that's engineered and proven under unnecessary or undue degradation (UUD) abilities. Pilot programs or phase-in practices with a potential for preventing UUD should be allowed as the project develops.

Response: BLM intends that the operator use equipment, devices, or practices that will meet performance standards and prevent unnecessary or undue degradation, including applying standard engineering practices and using proven technology. BLM also intends that operations be allowed to test and develop new methods or techniques for pollution prevention and reclamation. Where such test methods are applied, they would be conducted at a smaller scale and be backed up with proven technology in the event of failure.

11.20 **Comment:** 3809.401 (b) (1). Requirement for SS# is not reasonably related to the purposes of the proposed rule. How is a person's social security number reasonably related to the purposes of the proposed rule? How will BLM use it? Federal statute that created the Social Security system specifically prohibits the use of the social security numbers for identification purposes outside of the authorizing statute. Social security numbers should not be included in the requirements. A tax I.D., yes, but not a social security number. What is BLM's authority for making this information a requirement of the Notice or Plan? Will a Notice or Plan be rejected if this information is not given? For a corporation, operators and thus I.D. numbers are constantly changed. This becomes a reporting nightmare for a corporation and BLM in receiving, acknowledging, and filing constant changes. A more reasonable requirement would be to require the corporate operator to wear a corporate badge.

Response: The purpose of the requirement is for BLM to be able to determine the operator responsible for both the operation and site reclamation. The term has been changed to require a taxpayer identification number as suggested. A Notice or Plan would not be considered complete without enough information to identify the responsible operator. If a corporation is the operator, it should provide the corporate identification number. Persons working for a corporation do not have to provide individual identification or wear badges.

3809.401-Description of Operations

11.21 **Comment:** These proposals have the potential to increase the time required to get a permit by years. The process is now bogged down so that approval of Plans can take forever. Adding this layer of proposals will further delay time and increase costs as well as create a tremendous workload for BLM.

Response: The requirements for Plans of Operations essentially put into regulation the process that most BLM field offices are implementing. By describing these requirements in the regulations BLM intends to improve consistency among field offices and give operators more precise information on what is expected from them. The time it takes to process a Plan under these regulations is related more to the amount of other workloads and staffing expertise than to a change in the Plan content requirements.

11.22 **Comment:** The Carlota Final EIS largely ignored the historic record in extensive sections presenting mitigation and design schemes, etc., thereby not addressing the proven effectiveness of the proposals. Such situations should be avoided. Your EIS, for example, in the discussion of pit lakes, addresses the track record objectively. BLM should require all Plans of Operations, EISs, etc. to include an effectiveness assessment that shows how well proposals have worked, where, under what conditions, and for how long. If proposals are untested or experimental, they should be so labeled.

Response: Guidance on topics BLM should include in its environmental analysis of a Plan of Operations is more suitable for agency policy documents or handbooks, and is not detailed in these regulations.

11.23 **Comment:** This and the next section are the most important sections of the reformed regulations. The description of operations requires only "preliminary designs,..." ((2)(I)). Preliminary implies the Plans are not final. Does BLM propose to approve Plans that are not final?

Response: Many Plans of Operations present preliminary or conceptual designs for mine facilities that must eventually be highly engineered before construction. During its review, BLM typically requests information about such facilities to ascertain location, size, general construction, operation, environmental safeguards, and reclamation. The level of detail

required is highly variable and site specific, but must be great enough so that the agency can evaluate whether the facility is going to result in unnecessary or undue degradation. An approved Plan of Operations allows the facility to be built within the parameters outlined in such preliminary designs. Since operators may be uncertain as to BLM's decision, they may wait until BLM issues its approval before committing the resources for preparing detailed final engineering drawings and specifications. For example, an operator may propose a tailing impoundment of a certain size and location, but the environmental analysis is evaluating several alternative locations or disposal methods. In this case, there is no point in the operator's preparing final designs for an impoundment that may never be built. Once the preferred alternative is selected, the Plan of Operations approval decision could then require the operator to submit final approved engineering designs (and later "as-built" reports) to verify that the Plan of Operations, as approved, would be followed. Section 411(d)(2) had been added to clarify this process.

11.24 **Comment:** 3809.401(b)(2) is overly detailed, requiring extensive description of operations while still in the planning process. The current process is to try to avoid continual amendments to the Plan of Operations. But under these proposed regulations any changes (and many could be needed) to the description of operations would require plan modifications. BLM does not need this level of information at this juncture to carry out its surface management responsibilities. BLM should require only information sufficient to allow evaluation of impacts from the proposed operation. Extensive descriptions of the mining of multiple sites within one major mining operation due to variation of grade content or industrial material needs become vary complex, redundant, and of minimum administrative benefit, especially when they all constitute similar mining activities.

Response: Operations that are still in the "planning process" may not be ready to submit a Plan of Operations to BLM. For BLM to properly review a Plan of Operations, operators must give BLM a description of what they are proposing. This description must contain enough detail so that BLM can conduct the analysis required under NEPA, ascertain whether the Plan of Operations would prevent unnecessary or undue degradation, and develop any mitigation that may be needed to prevent unnecessary or undue degradation.

11.25 **Comment:** Some level of information is needed, but it is not necessary to require the same scope and level of detail for small operations as for large operations.

Response: BLM agrees. The level of detail will be based on the site-specific operation proposed and the geographic location. The performance standards under the Proposed Action are standards by which the operation will be measured. BLM will not dictate the methods and operational activities carried out by industry. Only the results of the methods will be evaluated by the standards. Therefore, the level of detail needed to complete the permitting process and meet the standards will depend on the natural resources at the

mining site. BLM does not intend to require extensive resource data unless the data is needed to make a reasoned decision and to measure the operations by the standards outlined. The level of detail will be based on the operation proposed and the potential natural resources affected. But if a small operation potentially affects a significant resource, the level of detail could be substantial.

11.26 **Comment:** If obtaining the detailed information in Section 3809.401(b)(2) requires more exploration work, many exploration targets may never be explored because of the time and expense of detailed exploration work, especially considering the proposed new requirements that will impose more costs and add considerable approval time to exploration projects on federal lands.

Response: The information required for a Plan of Operations would not substantially change over current practices under the existing regulations. The exploration work mentioned should be occurring, independent of any BLM requirements, to make sound technical and financial decisions on whether an economic deposit is present and to evaluate how it might be developed.

11.27 **Comment:** These sections of the proposed regulations should be revised to make it clear that the requirements of 3809.401 apply to a final Plan and to acknowledge that all elements will not be completed until after the NEPA and permitting processes are complete. BLM officials in the field should be given clear authority to adjust the level of detail required in the proposed Plan to reflect the timing and circumstances of each operation. The regulations should also allow conditional approval of the Plan (as is common now) pending completion of certain requirements. For example, a Plan might be approved contingent on submission of a final monitoring plan with a NPDES permit or a mitigation plan in connection with a 404 permit.

Response: The requirements of 3809.401(b) apply to proposed Plans of Operations. If the requirements apply and the Plan submission has addressed each element, then the Plan is deemed complete, meaning BLM has a complete description of the proposed action, and the NEPA process can continue. After completion of the NEPA process, BLM may issue a decision approving the Plan of Operations subject to any changes or conditions needed to prevent unnecessary or undue degradation. Section 401(d)(2) has been added to clarify where BLM might issue a conditional approval subject to inclusion of other agency permits into your Plan of Operations.

11.28 **Comment:** Plans of Operations BLM's proposed regulations require that an operator deliver a complete Plan of Operations as a finished product before BLM will begin its review of the proposal. Proposed 43 CFR 3809.411(a). With respect to timing, the proposed regulations create significant confusion as to when a Plan must be deemed "complete," and fail to reflect current practice, which is working effectively. Proposed 3809.401 describes the information needed for a complete Plan. Proposed 3809.411(a)

provides that BLM will review the Plan and may notify the operator that the submittal does not contain a complete description of the Plan under 3809.401. These two proposed rules can be read to impose a requirement that a Plan of Operations meet all of the content requirements of 3809.401 before BLM will begin processing the Plan. The proposed rule appears to be failing to distinguish between the requirements for an application for a Plan of Operations and a completed Plan of Operations.

Response: BLM starts the NEPA process as soon as a Plan of Operations is submitted, sometimes even sooner if operators wish to consult with BLM as they are preparing their Plans. The regulations describe the contents of a proposed Plan of Operations for it to be considered "complete." A complete Plan constitutes the proposed action of the NEPA document. The final, or approved, Plan is what results when the NEPA analysis is complete and BLM issues an approval decision.

11.29 **Comment:** 401(b)(2) Description of Operations: We question what BLM envisions in engineering design, water management, and quality assurance plans. Does BLM have staff members who can review this type of information.

Response: The level of detail for these specific plans will vary depending upon the type of operation being proposed, the local environmental setting, and the issues of concern. Often what you provide for an analogous state requirement would be adequate. BLM encourages you to consult with your local BLM office to determine how best to satisfy these requirements. BLM does employ mining engineers, geologists, hydrologists, and other natural resource staff that can evaluate this information. BLM also coordinates its reviews with other state or federal agencies who have expertise in these areas.

11.30 **Comment:** 3809.401(b)(2) What types of plans are being referred to? What is considered rock? What is considered rock handling? BLM requirements for characterizing rock should be clearly stated. What rock should the operator characterize? What is quality assurance? The state typically requires quality assurance plans for some parts of large mining operations. We do not require them for everything, nor do we require them for any operation at most smaller mines. We do not know what is being requested here. Is it quality assurance plans for construction of building, liners, dams, ore assays, or water quality sampling?

Response: Definitions for common terms such as "rock" are found in many standard and geological dictionaries. As used in the regulations, "rock" refers to materials such as overburden or waste rock and ore that would be excavated. "Rock handling" refers to plans for how this material will be characterized and handled or placed in order to mitigate its potential to generate acid rock drainage (ARD) or other leachate. What is required for rock characterization and material handling plans is highly site specific, depending upon the risk of ARD generation and the other resources in the area of operations that are potentially affected. Since material characterization can be both time consuming and

costly, consultation between BLM, the state, and the operator on the needed level of characterization is recommended early in the Plan review process. "Quality assurance plans" are plans or programs for monitoring and testing mining and reclamation components during construction. They are needed where performance highly depends on proper construction or installation as specified in the approved plans. Examples include earthen compaction for tailing dams or soil liners, synthetic liner installation, and placing specified thicknesses of growth medium for revegetation. Specific quality control plans are of developed under overall quality assurance programs.

11.31 **Comment:** BLM proposes to substantially revise both the requirements for filing and the content of proposed Plans of Operations. Proposed 3809.401. The proposed requirements do not differ materially from the typical contents of a final Plan of Operations for a large, modern mining project. We have three important concerns about the proposed requirements, however. The first is that the regulations are written for very large, complex mining operations, but will applied to all activities conducted under a Plan, even exploration. In the context of a smaller operation or an exploration project, some of the proposed requirements just do not make sense (e.g. water management plans, rock characterization, and handling plans). But BLM must require them or determine that the requirements do not apply. The second major concern relates to timing. The proposed regulations do not clearly specify when a Plan of Operations needs to be complete. The third major problem flows from the requirement in proposed 3809.411(c)(1) that BLM disapprove a Plan that does not meet the content requirements.

Response: BLM does not have to make a specific determination that each element of Section 3809.401(b) applies. Rather, BLM simply has to determine that the Plan describes the proposed activity in enough detail for BLM to analyze the Plan's potential impacts and give the operator a written list of items that are missing or incomplete. The sequence described in 3809.411 is that the Plan of Operations has to be complete before BLM completes the environmental review required by NEPA and any other consultations required by other laws or regulations. This means that the Plan must be complete before BLM can produce an environmental assessment or a draft EIS for public comment. This does not mean BLM will not start the NEPA process before receiving a complete Plan. In fact, conducting NEPA scoping concurrent with review of the initial Plan of Operations submission helps BLM and the operator focus the completeness review on issues of concern. But BLM obviously cannot approve a Plan if the Plan lacks enough detail for BLM to evaluate its impacts. An incomplete Plan is one example where BLM would withhold approval until it has received and evaluated the information.

11.32 **Comment:** Section 3809.401(b)(2)(viii) requires the operator to describe fully in the Plan of Operations plans for all access roads, water supply pipelines, and power and utility services. This requirement is too prescriptive. Supplying preliminary site layout drawings (rather than detailed layouts) gives BLM the information to assess unnecessary or undue degradation and gives the operator the flexibility and latitude to complete the final design.

Response: The level of detail required is highly site specific. Section 3809.401(b) has been revised to state that the level of detail must be sufficient for BLM to determine if the Plan of Operations would result in unnecessary or undue degradation.

11.33 **Comment:** Plans of Operations Water Management Plans. Within Alaska, discharges into surface and ground water are regulated by the EPA and Alaska Department of Environmental Conservation (DEC). EPA regulates storm water management. We are unclear what is asked of the operator under the water management requirement listed in this section. If it is only to provide information already required by EPA and DEC, then that should be clear. If this is a different and new requirement, we understand neither what is being required, how BLM would regulate it, or how it will be coordinated with EPA and DEC.

Response: Water management plans are plans for managing storm water, mine drainage, or processing solutions. Such information may already be required by other federal or state agencies. Review of water management plans would be coordinated between BLM and these other agencies according to local practice and interagency agreements such as memorandums of understanding.

11.34 **Comment:** Plans of Operations EPA has delegated the regulation of surface water under the Clean Water Act and ground water is regulated under state law. In Nevada, a Monitoring Plan is part of the Water Pollution Control Permit. This requirement is redundant and unnecessary.

Response: BLM does not intend to regulate water quality in duplication with state or other federal agencies. Rather BLM must consider how mining and reclamation affect water quality and how certain operating or reclamation practices may be conducted to reduce or eliminate potential impacts to water resources on its lands. The monitoring of water quality or quantity is one way to evaluate the performance of mining operations and the success of reclamation measures.

11.35 **Comment:** Plans of Operations, Section 3809.401(b)(2). BLM specifies several types of plans that must be submitted with Plan of Operations, such as water management plans, waste rock management plans, and spill contingency plans. These plans are usually developed with the states while the Plan of Operations is being reviewed and approved. EPA has delegated authority for these programs to the states. It may not be possible to include these plans with Plans of Operations; nor would BLM have the approval authority under federal regulations.

Response: Being able to consider these plans is critical in determining whether the proposed Plan of Operations would prevent unnecessary or undue degradation. Furthermore, such plans may of themselves call for building certain facilities on BLM

lands, such as monitoring wells, capture ponds, access roads, or storm water diversions, and therefore must be given to BLM as part of the overall Plan of Operations in order to get such facilities approved.

11.36 **Comment:** Plans of Operations Spill Contingency Plans. The state and EPA require spill contingency plans. We do not know what is requested here other than to meet the existing requirements of those agencies. If that is requested, it should be so stated and coordinated with the other agencies. If BLM is proposing something different from those requirements, we are concerned about duplicative agency jurisdiction. This is an excessive requirement that would fall under NEPA anyway, and the operator would not get an operating plan without it.

Response: NEPA compliance is a procedural requirement and does not require spill contingency plans. BLM can also require spill contingency plans to protect public land. Spill contingency plans provided to meet state or other federal requirements would also likely be adequate for BLM purposes. BLM would review such plans as part of the overall Plan of Operations review in coordination with other agencies.

11.37 **Comment:** Insofar as BLM has determined that is lacks adequate information on any relevant aspect of a Plan of Operations, BLM not only can require the filing of supplemental information, it is obligated to do so. We emphatically reject any suggestion that BLM must limit its consideration of any aspect of a Plan of Operations to the information or data that a claimant chooses to provide.

Response: BLM requires enough information to evaluate the performance of a Plan of Operations for preventing unnecessary or undue degradation. The information requirements listed under proposed 3809.401(b) are not exhaustive. Proposed section 3809.401(c)(1) requires information for completing the NEPA process, and proposed section 3809.401(c)(2) gives BLM the option of deciding that more information is required than is listed in the previous sections.

11.38 **Comment:** Plans of Operations 3809.401 (b) Required Information The implication of this section is that BLM may require that an EIS be prepared for a mineral exploration program. I'm sure that such a requirement is not contemplated in the intent of the Federal Land Policy and Management Act (FLPMA). As with the previous section, this section must be modified to acknowledge the distinction between different stages and scales of operations in accordance with FLPMA.

Response: The level of analysis (EA or EIS) is determined by the potential for the Plan of Operations to cause significant impacts and not necessarily by whether the activity proposed is exploration or mining. This determination is guided by the regulations for implementing the National Environmental Policy Act (NEPA) found at 40 CFR 1500, et.seq. BLM approval of a Plan of Operations under the 43 CFR 3809 regulations is a

federal action. As such it is subject to the NEPA regulations. These regulations require the preparing of an EIS for actions causing significant impacts. Environmental assessments (EAs) can be prepared for approval of actions that do not cause significant impacts. While most exploration does not present the potential for significant impacts, a particular exploration project could still cause significant impacts. In that case an EIS would have to be prepared.

11.39 **Comment:** Plans of Operations Section 3809.401 (b) 2. There must be some sort of minimal documentation for a beginning operation. My claim has not been surveyed. We have not taken core samples. We do not know the scope of the deposit. The minimal documentation level must be in the regulations and not left to the opinion of the local reviewer.

Response: The amount of information required in a Plan of Operations depends upon what you propose to do. The drilling and reclaiming of a single exploration hole could be presented on one or two pages, whereas large-scale mining may require thousands of pages of information to describe completely. Call you local BLM office for guidance on the level of detail it believes is needed for your particular project.

3809.401-Reclamation Plan

11.40 **Comment:** Plans of Operations The exact timing of each of the plans may vary by the type of operation, the location (both state and BLM district), interests of other federal agencies, and issues raised in the NEPA process. A reclamation plan may follow a similar path. An operator may first propose facilities with a particular layout. BLM (through the NEPA process or otherwise) may consider alternative locations. The operator or other agencies may suggest alternative locations. Reclamation techniques are likely to be considered for each facility at each location, but at a relatively general level of detail. It makes no sense to require a reclamation plan with a "detailed description of the equipment, devices, or practices" to be used until the final location of the facilities is determined. Similarly, of course, it makes no sense to require a detailed reclamation cost estimate until the final reclamation plan is set.

Response: Operators must present reclamation plans that they believe will meet the requirements of the regulations. The reclamation plan, as part of the Plan of Operations, is then analyzed in the NEPA process to determine its effectiveness. To analyze the plan a certain level of detail is needed up front. Final approval of the Plan of Operations may require the reclamation plan to be conditioned or modified as needed to prevent unnecessary or undue degradation. Section 3809.401(d) is worded so as not to require the reclamation cost estimate until later in the process when there is more certainty about what will be the final approved reclamation plan.

11.41 **Comment:** Plans of Operations 3809.401(b)(3) require a suitable level of detail for

reclamation plans. The proposed language should be amended to read: "Reclamation Plan. A plan for reclamation must meet the standards in section 3809.420." The other language in 3809.401(b)(3) should be deleted because it is not needed and creates potential conflicts between provisions. If the performance standards are met, a detailed description of reclamation equipment, devices, and practices are not needed, especially this early in the planning stage.

Response: The word "detailed" has been removed from the first section of this sentence. But the requirement is still to provide enough of a description on "how" the performance standards will be met that BLM can evaluate whether the reclamation plan is feasible and will achieve the desired outcome.

11.42 **Comment:** Plans of Operations 401(b)(3) Reclamation Plan: The term "riparian restoration" has a meaning different from reclamation. We do not understand the term "deleterious material" because it is not defined.

Response: The term "riparian restoration" is not used in 3809.401(b)(3). The term used is "riparian mitigation," which refers to plans for meeting the performance standard under proposed 3809.420(b)(3)(ii) for returning disturbed riparian areas to proper functioning conditions. "Deleterious material" is material with the potential to cause deleterious effects if not properly handled. Deleterious material could include material that generates contaminated leachate, is toxic to vegetation, or threatens wildlife or human health. The term is more inclusive than material with the potential to produce acid rock drainage.

11.43 **Comment:** Plans of Operations 3809.401(b)(3) The list in this section is too vague, especially in the "among other things." BLM requires the plan to be complete but how can an operator provide a complete plan if there is not a complete list of requirements.

Response: The exact details of what must be in a reclamation plan is highly project specific and site specific. If the Plan of Operations does not involve drilling then a reclamation plan for drillhole plugging is not needed. If the Plan of Operations does not involve disturbance in a riparian area then obviously a riparian mitigation plan is not needed. The operator must consider what activity they want to conduct and where, and then propose a reclamation plan for that activity that will meet the performance standards.

11.44 **Comment:** Plans of Operations What standards are being applied and how does the operator plug a drill hole? Define regrading and under what situations regrading would be required. Will BLM consider a project's unnecessary or undue degradation plan if the plan proves that the riparian areas are improved after the project? This would meet the requirement for no net loss. Referring to: "...the reclamation plan might also contain information related to other topics." What data collection is needed? Please specify in detail the types of data. It appears that an operator will need to have a Plan of Operations for a baseline study.

Response: Plugging requirements for drill holes vary by hole depth, aquifers encountered, water inflow, and artesian pressures. Regrading is moving excavated material to create a surface suitable for further reclamation. Plans that improve riparian areas would meet the performance standard in proposed section 3809.420. The quote on other information is not in the section on reclamation plans, but the list is not exhaustive, and other topics may have to be addressed by a reclamation plan if relevant. On large or complex projects it is not unusual for the operator to present a plan for collection of baseline information to BLM for review and comment.

11.45 **Comment:** The proposed rule also goes much further in the amount of reclamation planning required before the NEPA process begins. Operators submitting proposed Plans of Operations now must simply describe measures they will take to reclaim disturbed lands. The proposed regulations, in contrast, require an operator to submit a detailed reclamation plan that must include plans for the following: (1) drill-hole plugging; (2) regrading and reshaping; (3) mine reclamation; (4) riparian mitigation; (5) wildlife habitat rehabilitation; (6) topsoil handling; (7) revegetation; (8) isolation and control of acid, toxic or deleterious materials; (9) facilities removal; and (10) post-closure management.

Response: This is no change from what operators currently should be doing. Measures to reclaim disturbed lands under the current regulations should include all applicable elements of the proposed regulations you have listed. One reason new regulations are needed is to clarify what operators are currently expected to provide.

11.46 **Comment:** Plans of Operations. Revise .401(b) by deleting (3)(iv) and merge with (3)(v) because riparian in only one habitat type found on federal land. This special identification is unsuitable when BLM has presented no authority to require "mitigation" for nonjurisdictional wetlands or riparian habitat unless the project area is in a congressionally designated unit or non-congressionally designated unit where nonjurisdictional wetlands and riparian habitat are expressly listed and perhaps where BLM has a completed land use plan that shows the area for the proposed mining operation to be within an area of critical environmental concern (ACEC) that clearly names the resources to be protected and the mineral values lost on the same scientific basis.

Response: Under FLPMA, BLM has the authority to require mitigation of impacts to resources on the lands it manages. The authority for requiring mitigation of impacts to riparian areas is no different than that for any other type of habitat. But riparian habitat generally has greater biological diversity and hence higher resource values, making it suitable for individual consideration in the regulations.

11.47 **Comment:** Plans of Operations Revise .401(b)(3)(v) to assure that it includes all wildlife habitat to explain what is meant by the term "rehabilitation." Or better yet, reference a definition in 3809.5. Assure that BLM and the Forest Service are using the same

definitions and standards.

Response: Rehabilitation means to create usable and functioning wildlife habitat from a disturbed area, including all types of wildlife habitat. Although it may not be practical to recreate the same type of wildlife habitat that was disturbed, the area itself has to be suitable wildlife habitat. BLM cannot change the Forest Service surface management regulations. The scope of this rulemaking is limited to BLM regulations.

11.48 **Comment:** Plans of Operations. Revise .401(b)(3)(v) to accept as a proper identification of wildlife habitat that has been described in the approved BLM or Forest Service (FS) land use plan for the project area. The existing wildlife habitat described in the approved BLM or FS land use plan also becomes the baseline datum for considering the extent to which the proposed project will or will not modify wildlife habitat and whether the modification will benefit or harm the existing wildlife habitat.

Response: BLM encourages the use of land use planning information to help operators in the baseline characterization of wildlife habitat or other resources and to help develop mitigation plans. But information in land use plans is often collected at a broad scale and may not give enough detail about the project area's resources. Supplemental studies are often needed to support mining-level project approvals.

11.49 **Comment:** Plans of Operations. Revise .401(c)(3)(v) by modifying wildlife habitat to be only those expressly identified as an ACEC where existing and reasonably projected future mineral values have been professionally evaluated or in a congressionally designated special management area for a particular individual or group of wildlife species.

Response: Significant wildlife habitat values exist on BLM-managed public lands both within and outside special management areas. Limiting rehabilitation of wildlife habitat to those special areas is not in the public interest because it would create significant impacts to wildlife on other lands and these impacts can be readily mitigated by most operations.

3809.401-Monitoring Plan

11.50 **Comment:** Plans of Operations It is not practical or useful for an operator to design and submit a detailed water quality monitoring plan before discharge permit outfall locations have been selected and approved by state water quality permitting authorities. Similarly, plans for riparian mitigation, wildlife habitat rehabilitation, and facilities removal serve no purpose at this stage of review of the Plan of Operations. Certain elements of the Plan of Operations must remain fluid during the review and permitting process and can be finalized only after BLM has competed that review. Proposed 3809.401(b)(4) describes in great detail the content of a monitoring plan. Typically, a monitoring plan is not finalized until after the Plan of Operations has been through the NEPA process and key state environmental permits have been obtained. In fact, air, and water quality monitoring

points are typically determined through the state permitting processes and named in the permits. Those permits are issued with specific monitoring requirements, and then those monitoring requirements are incorporated into the Plan of Operations. Other components of Plans of Operations, including water management plans, rock characterization and handling plans, quality assurance plans, spill contingency plans and reclamation plans, are also developed and refined as the permitting process moves forward. The exact timing of each of the plans may vary by the type of operation, location (both state and BLM district), interest of other federal agencies, and issues raised in the NEPA process.

Response: The comment is correct in that certain portions of the Plan of Operations are expected to change as a result of the NEPA process. But BLM requires information on all aspects of the Plan, including monitoring programs, to determine if they will prevent unnecessary or undue degradation. This means basic information is required up front on what resources will be monitored, where and how, and what corrective measures would be triggered. The purpose of the NEPA process is to find shortcomings in such plans and develop corrective measure (mitigation) in those plans. BLM does not agree that development of monitoring programs should be deferred until after the Plan of Operations has been through NEPA analysis. A monitoring program, tied to corrective action triggers, can serve to mitigate many environmental impact concerns and should be developed simultaneously with the EIS alternatives and the Plan of Operations.

11.51 **Comment:** Plans of Operations. 3809.401(b)(4) governing monitoring plans is also too detailed, requiring very specific items that must be included, rather than encouraging the tailoring of the monitoring plan to site-specific conditions. The wildlife mortality provision should be limited to mortality resulting directly from operations and to specific species of concern (e.g. specified threatened or endangered species, migratory birds), and BLM should defer to monitoring plans developed for and approved by other agencies under federal and state programs (e.g., water quality or wildlife).

Response: The monitoring plan requirement described in proposed 3809.401(b)(4) uses terms like "where applicable," "may be necessary," and "monitoring the effect on your operation." Such language reflects that BLM expects monitoring plans to be tailored to site-specific conditions. If an operation even warrants monitoring for wildlife mortality in the first place, the monitoring plan would be developed around the specific wildlife concern. For example, the issue at one operation may be wildlife mortality from vehicles. At another operation the issue may be waterfowl mortality on a tailings impoundment. Each operations monitoring plan would target the mine facilities and wildlife of concern. BLM encourages operators to incorporate monitoring plans developed to meet other federal or state agencies requirements in order to eliminated duplication, and expects that these plans would most likely satisfy BLM requirements. But BLM would not automatically defer to such plans unless interagency agreements were in place.

11.52 **Comment:** Plans of Operations. Monitoring plans should include provisions to expand

the monitoring as impacts are observed. Mining often occupies geologically complex regions. The monitoring plan must provide for changes if conditions warrant. BLM must be able to expand the area and density of monitoring systems. For example, aquifer systems often have many fracture layers. It is essential to adequately monitor each layer. It may not be possible to determine the location and depth of each system in advance of writing the monitoring plan for the Plan of Operations. The regulations should reflect BLM's need to require expanded monitoring. Cost should not be a concern.

Response: Expanded or extended monitoring is one of the standard responses to adverse monitoring results and would, therefore, be part of most operations' monitoring plans. Furthermore, BLM could require expanded monitoring under proposed sections 3809.431(b) and 3809.601(a).

11.53 **Comment:** Plans of Operations. 401(b)(4) Monitoring Plan: Requiring a detailed monitoring plan duplicates this state's requirements and attempts to give BLM authority to regulate water and air quality. BLM simply does not have the delegated authority to regulate water and air quality under the Clean Water Act and Clean Air Act.

Response: A monitoring plan provided to meet state requirements would most likely meet BLM requirements, depending on the resource to be monitored. Proposed section 3809.401(b)(4) has been revised to encourage operators to incorporate other monitoring program requirements. States regulate water quality and air quality by monitoring discharge levels and comparing them to a state standard to determine compliance. BLM does not regulate water or air quality but mining that might affect these resources. To evaluate the performance of mining waste units and the effectiveness of mitigation, it is important to have the feedback that monitoring gives. Requiring monitoring plans does not give BLM any more authority than it already has under FLPMA to prevent unnecessary or undue degradation.

11.54 **Comment:** Plans of Operations. The discussion of monitoring plans should recognize explicitly that such plans may be required under other federal and state environmental programs and provide that BLM will adopt and incorporate those plans by reference without a duplicative review.

Response: Proposed section 3809.401(b)(4) has been revised to encourage operators to incorporate other monitoring program requirements. But it is not necessarily a given that such programs would cover the entire range of BLM's concerns and need for monitoring. Unless specific memorandums of understanding (MOUs) are in place deferring to other state or federal agency monitoring requirements, BLM reserves the right to require more or supplemental monitoring as needed to prevent unnecessary or undue degradation.

11.55 **Comment:** Plans of Operations. 3809.401 (401) Monitoring plan–requires that the operator specify a monitoring plan; this has historically been BLM's responsibility and

BLM's abdication thereof places an onerous burden on the operator.

Response: Though the operator first proposes a monitoring program, it is BLM's responsibility to review and approve the monitoring programs as adequate. BLM must also review data collected by monitoring programs and make determinations on operator compliance with the Notice or approved Plan of Operations, in cooperation with the states. BLM does not feel that it is an unfair burden to require operators to collect monitoring data on their operations. Nor is this a change from current practices.

11.56 **Comment:** Environmental monitoring can be a good thing if there have been complaints or if there is the possibility of environmental hazard. To require environmental monitoring on all operations on the Notice and Plan level would create a mountain of paperwork and backlog of samples that show nothing and would be expensive to acquire. The percentage of mining operations that have any pollution problems, especially at the Notice level, must be extremely small. Small operations cannot economially be expected to collect this kind of data. We are not trained in this field.

Response: The detail and complexity of monitoring programs depend on the type of operation and the environmental resources potentially affected. Small operations would require small monitoring programs. Exploration programs may not need monitoring programs beyond visual inspection.

11.57 **Comment:** Plans of Operations Monitoring - In many situations monitoring is a requirement under NEPA. Monitoring in and of itself is not mitigation. Monitoring with action levels defined and followup described is necessary. (for example if monitoring of ground water exceeds Safe Drinking Water Act standards, a plan for treatment and/or stopping further degradation is required. Same for air issues.

Response: You are correct. Monitoring by itself is not mitigation. That is why the monitoring plans required under 3809.401(b)(4) must include a description of the response actions that would be triggered by adverse monitoring results.

11.58 **Comment:** I come under a Plan of Operations. I've recently done some reclamation, but I notice that you want a monitoring plan now. This monitoring plan would require air quality monitoring, noise levels, and wildlife mortality. I don't know why BLM is requiring all this except as harassment. I don't think any of it is needed. In the mine area you're going to alter the environment. That's all there is to it. Until you reclaim afterwards and the area goes through its natural stages of ecological succession, nothing is going to happen. You are going to change the wildlife there, and I don't know why you're monitoring.

Response: One of the purposes of monitoring is to watch for offsite impacts that may constitute unnecessary or undue degradation.

3809.401-Baseline Data

11.59 **Comment:** Plans of Operations. 3809.401(c)(1) addresses BLM's ability to request information on nonpublic lands. This provision should be deleted because it gives the mistaken impression that BLM has, outside the NEPA process, the authority to require such information. This provision does not provide any guidance on the purposes for which BLM could need such information to "analyze""a Plan of Operations, and suggests that BLM may intend to regulate "nonpublic lands" under this provision.

Response: The provision is tied to the NEPA process as stated in 3809.401(c)(1). Guidance on how information is used in the NEPA process is available in the CEQ regulations for implementing NEPA (40 CFR 1500, et. seq.) and in agency handbooks. BLM has no regulatory authority over private lands. Section 3809.2(d) has been added to make this clear. But the scope of environmental analysis required by NEPA is to describe the environmental effects on all lands, even though BLM is only issuing an approval action for the public lands portion of a project.

11.60 **Comment:** Plans of Operations. 3809.401(c) The all-encompassing nature of data requirements under NEPA is being cited as a component of 3809. By referencing NEPA requirements in 3809, BLM is attempting to use NEPA authority to regulate mining. NEPA is intended to be an analysis and disclosure process, not a regulatory device.

Response: You are correct. NEPA compliance is a procedural requirement and does not set substantive requirements that operators must achieve. But the NEPA regulations do require BLM to describe impacts to all resources, including those over which BLM may not have regulatory authority or where BLM shares regulatory authority with other agencies.

11.61 **Comment:** Plans of Operations. The proposed rule authorizes BLM to require operators to submit operational and baseline environmental information. BLM may also require "static and kinetic testing to characterize the potential for...operations to produce acid drainage," as well as the submission of any other materials needed to ensure that operations comply with the regulations. These proposed requirements would impose substantial additional burdens on operators. The added burdens are especially troubling given the lack of any demonstrable need for new application requirements. Operators already provide the information that would be collected under BLM's proposed rule to states and other federal agencies. After a proposed Plan is given to BLM, BLM still has ample time to incorporate the information into its decision making process. In fact, gathering and submitting the information later in the plan approval process results in substantial cost savings to the operator without any prejudice to BLM.

Response: As the commenter correctly points out, the information requested by the proposed rule is already being collected to meet state and federal requirements. It is

therefore unclear how the proposed rule would constitute a "substantial additional burdens on operators." The regulations merely lists the types of information BLM has been requiring from operators under the existing regulations to provide for a more standardized approach and inform operators in advance of the information requirements.

11.62 **Comment:** What is the need for baseline environmental data for a moderate to large exploration project?

Response: Any Plan of Operations approval requires the preparing of an environmental analysis under NEPA. Depending upon the specifics of the exploration project and its location, baseline data may be needed for the NEPA analysis.

11.63 **Comment:** BLM has no authority to adopt a requirement with the all-inclusive language of 3809.401(c)(2) allowing BLM to request any other information it desires to comply with the subpart. It seems that BLM could define what information it requires in the Plan of Operations to prevent unnecessary or undue degradation. As such, this information should be included in the proposed regulations as a clear and concise checklist. BLM should not have the authority to make unlimited requests for any information it feels would be supportive of a Plan of Operations.

Response: Due to the wide variety of environmental settings where mining occurs, the range of mineral commodities of interest, and the variations in mining and reclamation technologies, BLM cannot list all potential information needs. Operators who feel that a specific BLM information request is not warranted can question the request or, as a last resort, use the appeal process in proposed 3809.800.

11.64 **Comment:** The proposed language of section 401(c) is inconsistent with NRC (1999) study Recommendations 14 and 15.

Response: NRC Recommendation 14 discusses planning to assure proper postclosure management of mine sites. Recommendation 15 discusses guidance manual preparation on BLM's authority to protect resources not protected by other environmental laws. Requiring baseline operation and resource information under proposed 3809 401(c) presents no conflict with these recommendations and in fact may facilitate their implementation.

11.65 **Comment:** The quality and quantity of baseline studies should be identified in the NEPA process as a part of the EA or EIS. Revise .401(c) to link any other baseline information requirements to those verified and validated during the scoping part of NEPA compliance. This would be consistent with NRC study Recommendation 10. As written this is an open-ended invitation for uneven and/or arbitrary and capricious action by BLM in its request for "nice to have" data. Further, the Department of the Interior requires the owner/operator to use BLM land use and activity plans as a basis for its application.

When BLM has prepared a FLPMA-driven plan and NEPA compliance documents without professional evacuation of existing and reasonably expected mineral values and potential impacts from mining on public lands, it is inappropriate for the Department of the Interior to pass on the cost of basic inventory or "nice to have" data to the owner/operator unless the owner/operator is given financial credit equal to the cost of the data collection. The preamble notes that this information is now collected by BLM but would become the responsibility of the operator. What is the specific authority for transferring this burden to the operator? Revise .401(c) to give a financial credit to the owner/operator that is not less than the cost to the Federal Government of collecting and analyzing data that are new or enhance an existing public data base for public lands.

Response: Section 401(c) already links baseline data requirements to the NEPA process. Scoping, as part of the NEPA process, would be used to determine issues associated with the operator's proposal and to determine baseline data needs. Although BLM planning information is useful, it may not be specific enough to support the NEPA analysis of an individual project. BLM believes that information required to support the approval of Plans of Operations is the responsibility of the operators because they benefit directly from the Plan approval.

11.66 **Comment:** The preamble states "BLM may require (the operator) to supply Operational and baseline environmental information for BLM to analyze potential environmental impacts as required by NEPA." This could include information of public and non-public lands. Could this language be used to preclude a mining project if the proponent cannot obtain permission to access adjacent private lands to collect baseline data for BLM analysis?

Response: The availability of environmental information to support NEPA analysis does not determine whether a project is approved or denied. The regulations implementing NEPA provide a mechanism for addressing incomplete or unavailable information. See 40 CFR 1502.22 for details.

11.67 **Comment:** BLM requires operational and baseline environmental information to analyze potential environmental impacts. There is no guidance as to how much data could be required. What is the definition of "adequate"? While needed data naturally varies with the site, it would be very useful, both to the reviewing public and to the mining proponent, for BLM to provide guidance as to what is adequate baseline information. For example, hydrologic trends cannot be detected for years but are essential to understand when considering potential impacts or predicting the future. Adequate transient data is needed for calibrating hydrologic models. There should be a way for BLM to encourage the collection of baseline environmental data during the exploration phase, which often spans several years.

Response: As the comment serves to illustrate, the amount and type of data needed to

evaluate a project will vary greatly by the type of activity proposed and the other resources potentially affected. For example, if hydrologic modeling is not warranted on a particular project, then there would be no reason to require data sufficient to calibrate a hydrologic model. BLM believes that more specific requirements on baseline information should not be put in the regulations because of the site specific nature of the analysis and the potential for future changes in analytical approaches that may warrant different types and levels of data collection needs. BLM does encourage the collection of data in the advanced exploration phase to help the operator develop decisions and facilitate the mine plan review should one be submitted. BLM can best encourage the operator to collect this information early by stating that it will ultimately be required for mine development as is stated in proposed section 3809.401(c).

11.68 **Comment:** Plans of Operations. This entire section is disconnected from the NEPA process established in the CEQ regulations at 40 CFR 1500, et. seq. and is not consistent with the NRC study findings and recommendations (NRC 1999). The Department of the Interior should critically review the linkage between the requirements here and the purpose of the public NEPA scoping process. The owner/operator and BLM must work together during the pre-application phase of project development. But the final test of what is or is not required and the level of detail can be finalized only after scoping has been completed. Special attention is needed in the final regulations to assure compliance with NRC study Recommendations2, 9, 10, 11, 15, and 16. Reliance on the NEPA scoping process also assures that the owner/operator expends time and money only for things that come out of the NEPA process rather than the inexperience or bias of a BLM application reviewer. The final regulations need to assure that BLM and the Forest Service (FS) are using the same standards to the greatest extent permitted by federal law. This section also needs to be consistent with the NRC study Recommendation 2 that a Plan of Operations "should not be viewed as an opportunity to slow the process through extended review, but rather as an opportunity to develop the information needed for improved operation and for better monitoring and enforcement" (page 96) and the existing permitting process is "burdensome to operators and does not provide the best environmental protection" and there is a tendency for BLM and FS to avoid making a final decision "for years, even decades" (p. 122). The proposed section is inconsistent with NRC study Recommendation 13, which emphasizes that BLM and FS should have current land use planning that assures that Congress, high officials in BLM and FS, the public, and stakeholders are fully aware of areas of federal land that require special consideration.

Response: The proposed section 3809.401(c) is consistent with all NRC recommendations and is designed to give the operator a list of information that BLM may require during the Plan of Operations review process. This section also encourages consultation with BLM on the exact type and level of detail needed to support the NEPA analysis. While scoping is important for determining what needs to be studied and will determine much of the baseline data needs, the final contents of an approved Plan of Operations cannot be known until the study (EA or EIS) is completed.

11.69 **Comment:** BLM's proposed regulations on the content and review of Plans of Operations are directly contrary to the NRC Committee's recommendations. The new requirements require more data (without explanation) and add complication to an already complex process. The new requirements do not provide for clear coordination with other federal and state agencies. BLM should abandon the expanded content and review requirements.

Response: The content requirements merely describe the current practice being followed by most BLM field offices. General coordination with state agencies is covered in section 3809.200s. Review for specific Plan of Operations approval is covered in 3809.411, which lists specific consultation requirements with the Fish and Wildlife Service, the Advisory Council on Historic Preservation, Native American governments, and the states.

11.70 **Comment:** Plans of Operations Section 3809.401 (c). Would require an operator to submit certain operational and baseline environmental information to enable BLM to analyze potential environmental impacts as required by NEPA. This requirement could stall operations for several years. The data would be prohibitively expensive for the untrained operator to acquire, and small operators are not usually present during rainfall/snowfall periods and thus cannot collect the data. It is inappropriate to stall a beginning operation for several years, all the while incurring large environmental measurement costs, and expect the beginner to incur these expenses before the first year of real operations. We must be able to maintain a cash flow. Product extracted and sold must be of greater value than the extraction and administrative costs. Otherwise only a fool would begin this process.

Response: Small-scale operations would not likely require extensive data collection. BLM is will help operators determine the needed level of baseline data suitable to the size of the project.

3809.401-Reclamation Cost Estimate

11.71 **Comment:** Plans of Operations 3809.401(d) BLM should be required to set a specific time limit on how long it will have to review the reclamation cost estimate and a time line for operators so they know when the cost estimate is due.

Response: Operators can submit a reclamation cost estimate at any time. But since a reclamation cost estimate can represent a significant amount of time and engineering resources, BLM decided it would be best for operators to wait and prepare the cost estimate when the Plan of Operations review process was nearly finished. This way changes to the reclamation plan resulting from the NEPA analysis can be incorporated into the cost estimate, saving the operator resources. BLM intends to respond to the operator's reclamation cost estimate similar to the completeness review process described

in proposed section 3809.411(a).

3809.411 BLM Actions on a Plan

11.72 **Comment:** Plans of Operations. NRC Report Conclusion - p. 92 [g] NMA has serious concerns about delays in agency actions. BLM has noted in the proposed rule that due to "workload demands, staffing levels, NEPA compliance activities, and the increasing need to consult agencies or Tribal governments, setting a new time limit on Plans of Operations is no longer practical." 64 Fed. Reg. at 6435. Indeed, BLM's proposal would essentially eliminate the limited time deadlines that now exist in the current 3809 rules. After 18 years of experience, BLM should need less time to review plans, not more. Delay in the permitting process is one of the most significant impediments to continued domestic mining investment. Recent experiences with BLM approval of Plans of Operation have shown increasingly longer periods of time to obtain approval of the Plans. The proposed regulations do not address the most serious problem with the existing regulations, which is that new mines take much too long to obtain permits. Meaningful regulatory time frames for plan review should be specified, such as, 90 days where only an environmental assessment is required, and 18 months where an EIS is prepared. In addition, if BLM establishes a new review process for modifications of Plans of Operations, it must include time frames for BLM's review and approval.

Response: Even under the existing regulations it may not be possible to complete review of a non-EIS-level Plan of Operations within the prescribed 90 days. Many of the time frames BLM must follow are related to coordination with other agencies, or with completing mandatory consultation processes that cannot be placed under preset time restrictions. Though BLM may have gained experience in processing Plans over the past 18 years, this experience has been offset by the more technically complex issues, such as acid drainage, that require a comprehensive review, and by the added coordination efforts needed to interact with other agencies. BLM believes that under these circumstances the best ways to expedite the process are the following (1) to have regulations that state the information requirements for the operator, (2) to require BLM to give the operator a list of any deficiencies within 30 days, (3) to provide for interagency agreements with the states to reduce overlap, and (4) to consult with operators early in the mine planning process on the required information and level of detail that would be needed to meet the requirements of the regulations. The behavior of other agencies involved in the permitting process is beyond BLM's control.

11.73 **Comment:** Plans of Operations These practical problems are greatly magnified by proposed section 3809.411(c), which dictates that "BLM must disapprove, or withhold approval of a Plan of Operations if it (1) does not meet the content requirements of 3809.401." There is no conceivable legal or policy reason BLM would want its regulations to require that it "must disapprove" a plan. BLM should eliminate the mandatory disapproval language from the regulations. That language can only constrain the agency's

discretion, and on appeal, the Interior Board of Land Appeals's. This proposed language, combined with the detailed plan content requirements, creates fertile ground for appeals by opponents of mining projects. On appeal, BLM may be required to defend not only the substance of its decision, but its decision on the completeness of every aspect of the Plan of Operations, including the level of detail of the project description and design, and the long list of plans required by proposed section 401. Under the language of the proposed regulations, appellants may argue that the plan must be disapproved because BLM failed to demonstrate that the operator has crossed every "t" and dotted every "i" in the plan application, even if there is no doubt that the plan as approved will prevent unnecessary or undue degradation.

Response: That particular sentence under section 3809.411 has been reworded and the "must disapprove" phrase has been removed, although BLM can still disapprove a Plan of Operations as one of its possible decisions. A decision that a Plan of Operations is "complete" does not automatically mean BLM has determined it is adequate to prevent unnecessary or undue degradation. A "complete" Plan is one in which the operator has merely described a proposal in enough detail that BLM can analyze the Plan to determine whether it would prevent unnecessary or undue degradation. Only after the complete Plan has been analyzed and any needed mitigation has been developed to prevent unnecessary or undue degradation, can BLM issue an approval decision on the adequacy of the Plan to prevent unnecessary or undue degradation. Upon appeal, the decision under review would be whether the Plan of Operations "as approved" will prevent unnecessary or undue degradation. BLM's determination that a proposed Plan of Operations is complete is considered interlocutory, meaning part of a larger decision that would be afforded the opportunity for administrative review, and is not intended to be appealed separately.

11.74 **Comment:** Proposed 3809.411 seems to require compliance with all of the information requirements of proposed 3809.401 before the plan is "complete" and before BLM can initiate the substantive review process, including NEPA review. This cannot be BLM's intent, for it requires the operator to submit documentation in a needless level of detail and requires BLM employees to review plans and information that can be no more than hypothetical.

Response: Operators must give BLM enough detail on their proposed Plans of Operations so that the potential for unnecessary or undue degradation can be evaluated. Section 3809.411(d) has been revised to provide for the incorporation into the Plan of Operations of other operating details that may result from review of the Plan by BLM or other agencies.

11.75 **Comment:** The filing of a Plan of Operations by a mining claimant invests no rights in the claimant to have any Plan of Operations approved. The right to mine under the mining laws are derivative of a discovery of a valuable mineral deposit and, without such a discovery, denial of a Plan of Operations is entirely appropriate. Claim validity is

determined by the ability of the claimant to show a profit and can be made after accounting for the cost of complying with all laws. When a claimant cannot do so, BLM must reject the Plan of Operations and take steps to invalidate the claim by filing a mining contest.

Response: The commenter is correct that filing a Plan of Operations does not create any right that did not previously exist. But if the land involved is open to the operation of the Mining Law, BLM can approve a Plan of Operations without a discovery. For example, a Plan of Operations for exploration to be used to make a discovery could not logically require a discovery and a mining claim before its approval.

11.76 **Comment:** 3809.411(c)(2) would require BLM to disapprove operations in areas segregated or withdrawn from the operation of the mining laws. Segregation is not enough to trigger disapproval of a Plan of Operations. Lands should be accessible under the mining laws until the formal FLPMA withdrawal process has been followed. To do anything different would violate FLPMA's congressional mandate. This section should be deleted.

Response: BLM disagrees. Areas that are segregated from operation of the mining laws are no longer open to entry under the Mining Law. Operations proposed in these areas must have made a discovery before the segregation to have a legitimate right to proceed.

11.77 **Comment:** Revise .411(d) to require BLM to immediately make copies of a completed proposed Plan of Operations available to other permitting federal agencies, to state agencies, and to local and tribal governments, and to private surface owners as appropriate. Revise .411(d) to require BLM to publish notice in a local newspaper and/or the *Federal Register* that (a) a complete application can be reviewed at the local BLM office and, as appropriate (b) whether an onsite inspection of the project area is scheduled and if so the date and whether the public is invited. This revision will allow public input into the adequacy of the existing data base and an opportunity to up-front identify issues not in the existing BLM land use or activity plans for the project area.

Response: It is not practical for BLM to make and distribute copies of the Plan of Operations. But because an operator does not have to submit a Plan to BLM in any particular form, the operator can give BLM copies of information it gives to other agencies to satisfy a BLM requirement. BLM does not feel that a notice always needs to be published in the local newspaper at the start of the Plan-approval process. BLM will conduct public scoping on individual Plans of Operations commensurate with the proposed project's size and potential impact and the level of public interest. Scoping may or may not involve public announcements and meetings before the environmental analysis. Section 3809.411(c) has been revised to require a 30-day public comment period on all Plans of Operations which we anticipate would be conducted concurrent with review of the environmental analysis.

11.78 **Comment:** Revise .411(d) to require within 7 business days after the close of the public comment period that BLM issue a summary of public comments and the extent to which BLM's decision will consider issues and data deficiencies raised by the public. The summary and BLM decision must be made available to all persons commenting on the proposed project, the owner/operator, and concerned federal, state, local, and tribal governments and private surface owners as appropriate.

Response: All comments received during the review of a Plan of Operations are available to the public. While BLM often prepares scoping reports on large projects, a summary of public comments is not needed in all cases and could not be prepared within 7 days. BLM considers all comments raised by the public. But the extent to which they would drive data deficiencies and completeness reviews on a Plan of Operations is not known until the process is concluded.

11.79 **Comment:** The proposed combined time frames proposed in .411 are excessive. First, BLM takes 6 weeks to review the proposed Plan of Operations. Then BLM proposes to publish notice in a local newspaper and wait 30 days for public comment. If the current pattern for approving additional time to comment is continued, BLM can reasonably expect that on day 29th day of the comment period there will be a request for more comment time. Except for requests for an appropriate comment period on the proposed 3809 regulations, the Department of the Interior routinely grants extended comment periods. The cumulative time line for a simple, noncomplex Plan of Operations for exploration involving less than 7 acres of disturbance has consumed the following time: 6 weeks for BLM review, 1 week for approval of a proposed decision, 1 week to get publication in a local newspaper, 4 weeks for comment, 1 week to consider the request for extension, 4 more weeks for the comment period to remain open, 1 week to analyze the comments, 1 week to prepare a final decision, 1 week in the burdensome, convoluted bureaucratic process of briefings-surnames-signature, publication of the record of decision, and 4 week hold before the record of decision can be implemented (assuming there are no appeals). The total lapse time amounts to about 24 weeks–6 months! Even if the estimate is cut by 50%, 3 months is still too long for an environmentally responsible and legal use of public lands. Revise .411(a) to retain the existing calendar day time frame. Revise .411(a)(2) and (4) to require BLM within 5 days to give notice to the owner/operator that (a) the submission is complete and has been distributed for review to permitting entities, Natives, and private surface owners as appropriate, or (b) there are deficiencies described in sufficient detail that the owner/operator can timely submit the missing data, and/or (c) there will be an interagency/public onsite visit on a mutually acceptable date. BLM can drag the review on and on and on until basically the company goes away.

Response: The minimum time frames for a Plan of Operations are 30 days, or less, for BLM to provide a completeness review and another 30 days for public comment on the environmental analysis. Time periods have been changed from working days to calendar

days. This means a simple Plan of Operations could be approved for implementation in less than 60 days from initial submittal to BLM. More complex Plans requiring detailed analysis or consultation would take longer.

11.80 **Comment:** The draft rule must be strengthened to require full analysis and resolution of all concerns before a final EIS and record of decision are issued.

Response: The proposed final regulations require the analysis of all issues identified during the Plan of Operations review, and that the approval of Plans of Operations be conditioned to prevent unnecessary or undue degradation. But this requirement does not guarantee that all public concerns will be resolved because mining will still cause some surface disturbance.

11.81 **Comment:** Permitting delays will also occur because BLM is greatly increasing its responsibilities and the information that it will require from operators to submit, without any increase in BLM field staff. The proposed rules do not contain any commitment by BLM to seek and obtain increases in staffing or other resources for administering the new requirements imposed by the proposed rules. It's my opinion that BLM has neither the staff nor the expertise to implement the proposed regulations.

Response: Permitting time frames will depend upon the number of proposed operations in addition to the regulatory review requirements. Although BLM recognizes the need for increased capabilities in the 3809 program, the number of new Notices and Plans has been declining in recent years. The proposed rule cannot establish or commit to certain funding levels because funding is handled through the appropriations process subject to congressional approval. BLM will evaluate program needs and request funding at what it believes to be a suitable level. But such funding requests are subject to competing priorities within both the administration and at the congressional level.

11.82 **Comment:** I suggest that the result will be that a prospective operator will have to fund third-party consultants to help BLM review of Plans of Operations because BLM does not have the expertise to comply with the proposed regulations. The prospective operator would then have to fund consultants to work out the differences between the state and BLM reviews. These costs may be considerable and are nowhere considered in the EIS economic analysis. Neither are the costs associated with expanded time frames needed to complete the review and approval of a plan of operation, nor the expanded time frames to complete the NEPA process.

Response: Operator costs to conduct the needed NEPA evaluation and processing are considered in the mine models presented in Appendix E and are part of the impacts to mineral activity shown in Table E1.

11.83 **Comment:** The proposed regulations should be changed to fully integrate the input from

EPA and state environmental agencies before approval of Plans of Operations. Under current procedures, after an final EIS is issued, the mining company submits its draft Plan of Operations to BLM for approval. There is no formal requirement that BLM secure certification from state environmental agencies or EPA that all environmental permits have been secured before plan approval. Such a process would assure that the mining companies have met with and secured the entire range of permits needed to comply with environmental regulations. (The USDA Forest Service currently requires a similar type of certification.)

Response: Interagency agreements can be developed with the states under section 3809.201 to address coordination of state environmental permits with the Plan of Operations approval. Section 3809.411(a)(3) has an added requirement that BLM consult with the states to ensure operations are consistent with state water quality standards. Section 3809.411(d)(2) has been added to require incorporating other agency permits into the Plan of Operations.

11.84 **Comment:** Why does 3809.411 give authority for approval, denial, or delay of Plans to individual BLM offices and employees? While we are confident in the experience and knowledge of our current local BLM contacts, we are not so confident about the future. Will we have to deal with whatever value system the local BLM officials have, regardless of proven methodology? Can field office people overlook their biases to develop suitable criteria? What will be the public involvement in that process? Will science play a role, or does passion take precedent?

Response: Approval for a Plan of Operations or review of a Notice is delegated down to the field offices under the existing 3809 regulations. The proposed final regulations do not change that delegation.

11.85 **Comment:** Section 3809.411(d) requires BLM to accept public comment on the amount of financial guarantee and 3809.411(a)(4)(vi) states that BLM may not approve a Plan of Operations until it completes a review of such comments. Is the intent of this section that BLM will respond to these comments as well? If so, this should be stated in this section These requirements will add extensive time to the BLM review process and increase BLM's workload without increasing the effectiveness of BLM's surface management regulations. BLM and the states have expertise in setting financial assurance. The public does not have the knowledge or training to comment on financial guarantees before plan approval and would not likely add anything to that process. Public scrutiny of the mechanics of the financial guarantee is no more helpful than for other areas of the mine permit and does not deserve special emphasis. If public comments are believed appropriate, they should be solicited in the same manner and according to the same time frame that applies to other issues in the NEPA process.

Response: BLM has changed the proposed final regulations to eliminate the public

comment period on financial guarantees. Instead, BLM has added a mandatory public comment period on the Plan of Operations as part of the NEPA analysis. During this comment period BLM could also collect comments on the financial guarantee amounts to the extent they are available during the comment period. Regardless, financial guarantee information is open to the public. BLM will respond to comments on the reclamation cost estimate the same as it will respond to comments on other aspects of the Plan of Operations' NEPA analysis.

11.86 **Comment:** BLM is basically taking no steps to have any responsibility and allowing the public to say what is most appropriate technology and practices (MATP). BLM should allow public comments that do not fit into the national standards mentioned in 3809.420. This section has the potential not to allow even baseline studies because large projects may have more than 5 acres disturbed. This issue needs to be clarified. The only sector of the public interested in this would be those who want to stop a project.

Response: The definition of MATP in the proposed regulations was tied to the technology and practices needed to meet the performance standards. The term has been dropped from the proposed final regulations.

11.87 **Comment:** 3809.411(d) BLM is leaving this section open ended. There are absolutely no standards for the operator to use. This proposed section essentially allows any amount of money and reclamation tactic to put in the Plan, whether the option is good or not. BLM should not allow comments on items that are not proven technology and do not follow a logical flow of costs and events.

Response: Proposed section 3809.411(d) provided for public comment only on the financial guarantee amount. It did not allow the public to set the amount of the reclamation bond or establish the reclamation plan.

11.88 **Comment:** 3809.411(c) This section does not state what the applicant can do if the Plan of Operations is denied or disapproved. What are the options (resubmitted with revision, give up and go home, or what)? Please clarify this section.

Response: This section has been modified and moved to 3809.411(d)(3). The BLM decision would advise the operator of corrective actions that must be taken for the Plan of Operations to be approved or of the rationale for a decision that the Plan of Operations could not be approved because it would cause substantial irreparable harm to significant resources and that harm could not be mitigated. If operators disagree with a decision and want to appeal it to the state director or Interior Board of Land Appeals, the decision would also advise them of the appeals process.

11.89 **Comment:** Section 3809.411(a). What do you mean by "complete"?

Response: A "complete" Plan of Operations is one that contains all the needed information listed in Section 3809.401(b) and describes proposed operations in sufficient detail that BLM understands it enough to determine whether it would cause unnecessary or undue degradation.

11.90 **Comment:** 3809.411(a)(4)(i) Define "adequate."

Response: Adequate baseline data refers to the information listed in proposed section 3809.401(c)(1) that is needed to support the environmental analysis (EA) or EIS required under NEPA.

11.91 **Comment:** 3809.411(a)(4)(v) Will "citizen" inspectors be accompanying BLM at this point?

Response: The provision on citizens accompanying inspectors has been changed to providing annual opportunities for tours. Aside from that, an on-site visit before initiating surface disturbance might benefit the public and would not interfere with operations.

11.92 **Comment:** The bottom line of that decision is that BLM has the authority to, and should prevent all offsite impacts due to mining, whether these impacts be caused by actual surface disturbance, wind-blown pollution, mine dewaterting, acid rock drainage, or anything else. Mining proponents should not be allowed to externalize their costs over hundreds of square miles of surrounding public lands (as occurs in northern Nevada due to dewatering drawdown). Onsite impacts should be limited to surface excavation and be totally reclaimed.

Response: Impacts from operations cannot be confined exclusively to the area of surface disturbance. Impacts to many resources transcend this boundary due to the nature of the effect. Visual impacts can often be seen for miles. Noise from operations can be heard a good distance from the project area. Wildlife may be displaced. Even impacts to such resources as water and air will extend beyond the immediate disturbance because of the establishing of compliance points and mixing zones. The decision BLM must make is do the impacts constitute unnecessary or undue degradation, and if so, what measures must be employed to prevent this degradation?

11.93 **Comment:** Duplicating existing state and federal programs would extend the time required for approval of Plans of Operation and permitting.

Response: The Plan review process does not represent a substantial change from the current practice of working with the states on joint reviews. Memorandums of understanding developed under the proposed final regulations that provide for the state to have the lead role may actually expedite the permitting time frames.

11.94 **Comment:** BLM should be allowed more time, at least 30 business days, to review Plans of Operations submitted by small operators.

Response: The proposed final regulations give BLM more time if needed to review Plans of Operations that require preparing an environmental assessment.

11.95 **Comment:** Section 3809.411 takes away the 30-day response time BLM has to reply to a miner's Plan of Operations and could allow BLM to delay action on a proposed Plan and possibly cost the miner a whole season. Mining is a seasonal activity for most small operators and recreational miners. By removing the 30-day response time, BLM has a new tool for stopping a proposed operation without the actual denial of a Plan of Operations.

Response: Section 3809.411 requires BLM to respond to the Plan of Operations within 30 calendar days. After a complete Plan of Operations is received and the environmental analysis prepared there is another 30-day public comment period. BLM acknowledges it could take several months to review and approve a small mine Plan where there are no substantial resource conflicts. Operators should anticipate this review time and submit their proposed Plans far enough in advance that activity can begin when scheduled. For seasonal activity a Plan of Operations does not necessarily have to be filed with BLM every year. A single Plan of Operations that describes the seasonal nature of the activity and the overall duration of the operation would be sufficient. For example, a Plan could state that mining would occur from May 1 through September 1 every year for the next 5 years. Section 3809.401(b)(5) has been added to the regulations to help operators develop interim management plans for Plans of Operations that involve seasonal activity.

11.96 **Comment:** EPA is concerned about the perpetuation of current procedures that do not promote cross-referencing between the final EIS and the Plan of Operations. Experience has shown that mining companies often change key design and operating features in the Plan of Operations and these changes were not noted (or given little analysis) in the final EIS. Not linking the EIS process with the Plan of Operations process allows the introducing of features that were not adequately evaluated or publicly disclosed and could increase environmental risks at the site. We believe that the proposed regulations should include a process to ensure that major mine design features noted in the Plan of Operations are fully evaluated in the final EIS. If there are significant changes in the mine plan after the final EIS is complete, a supplemental NEPA document should be prepared. Also, we suggest that the recommendations noted in the final EIS on mitigation measures be cross-checked in the Plan of Operations to assure that mitigation approaches committed to by BLM in the EIS process are included in the Plan of Operations.

Response: Under the existing regulations operators are required to follow their approved Plans of Operations. If there is a problem with operators not doing this, it is a compliance problem, not a NEPA problem, and is best addressed through improved enforcement. The

proposed final regulations provide that failure to follow the approved Plan of Operations constitutes unnecessary or undue degradation. Proposed section 3809.601(b) provides that BLM may order a suspension of operations for failure to comply with any provision of the Plan of Operations. Mitigating measures needed to prevent unnecessary or undue degradation, developed during the NEPA process, are required as conditions of approval. Revised proposed section 3809.411(d)(2) requires the operator to incorporate these measures into the Plan of Operations. If operators want to change their operations, they have to file a modification under 3809.431(a) and undergo a review and approval process similar to the initial Plan of Operations approval.

11.97 **Comment:** Barrick also objects to the requirements that a Plan be disapproved if it requires postmining water quality treatment. BLM has no legal authority to declare water treatment to meet water quality standards as per se unnecessary or undue degradation of federal lands.

Response: The proposed final regulations do not require BLM to disapprove a Plan of Operations if it requires postmining water quality treatment. In fact, the proposed final regulations specifically anticipate postmining water quality treatment needs in the performance standards and financial assurance sections. In the EIS, Alternative 4 would not approve Plans of Operations where post-closure treatment is anticipated beyond 20 years. Several earlier working drafts of the proposed final regulations contained a prohibition against perpetual water treatment. BLM decided to drop this provisions because of the uncertainty in predicting a "perpetual" need for water treatment and the proven reliability of treatment technology. BLM still views long-term water treatment as the option of last resort and favors reclamation that incorporates pollution prevention measures over treatment. This preference is reflected in the proposed final regulations but does not constitute a disapproval requirement.

11.98 **Comment:** The times within which BLM must act to approve or disapprove operations are effectively unlimited in Proposed Section 3809.411. In addition to unlimited time periods for BLM to take those actions, once approving a plan, BLM must publish (for an unspecified time) in newspapers the amount of and basis for the financial guarantee and then allow 30 days for public comments on that publication. No time limit is specified for evaluation of those comments. Proposed Section 3809.411 would cause extreme difficulties for the commencement of activities under Plans of Operations. The present regulations for plan approvals should be retained.

Response: Section 3809.411 requires BLM response to Plans of Operations within 30 days regarding completeness. The requirement for a separate public comment period on the financial guarantee has been removed. BLM does not believe mandatory time frames for the Plan review and NEPA analysis can be realistically set due to the uncertainty of many mining technical issues and the need for interagency coordination and consultation.

11.99 **Comment:** In the interest of clarity and practical usage, a brief statement on the right of administrative appeal and referral to the rules at 3809.800 should be included at the end of 3809.313 and 3809.411. At any point that an agency decision is referenced in the regulation, the right to appeal should be noted, and the appeal procedure cited.

Response: Because of the many possible decision points in the process, BLM does not want to give the mistaken impression that only certain decisions or determinations can be appealed. Including the appeals language at all possible points would make the regulations more complicated than needed.

11.100 **Comment:** Assure that the final regulations are used in the same way by both BLM and the Forest Service.

Response: BLM has no authority over what rules the Forest Service might follow on lands under its management.

11.101 **Comment:** The proposed combined increase in the federal decision time frames proposed in .411 are inconsistent with NRC study Recommendations 2, 12, and 16 (NRC 1999).

Response: The proposed review process is not inconsistent with the NRC recommendations. Recommendation 2 is to require Plans of Operations for all mining. This requirement will obviously increase the time frame for mining that is currently being processed under a Notice. Recommendation 12 discusses staff training, something that proposed section 3809.411 does not change. Recommendation 16 is for a more timely permitting process while still protecting the environment. Section 3809.411 has been written to state what the permitting process is and to include the consultation suggested by NRC recommendation 10. Added review times, such as for financial guarantees, have been combined with the NEPA review where possible to make the process more efficient. The timeliness of the permitting process can be greatly influenced by the adequacy of information the operator provides. The proposed final regulations provide guidance for operators on information needs, enabling operators to anticipate agency requirements and facilitate the review process.

11.102 **Comment:** Sec. 3809.411: The people of California have made a significant investment in the California State Park System. Their interest in using and protecting these lands does not stop because of an ownership boundary. For these reasons, the proposed regulations must recognize that sensitive resources and sites may be adjacent or close to federal public lands that may be affected by decisions under these rules. The proposed regulations should recognize the potential for impacts to sensitive areas such as state park lands and require early consultation with the affected land managers during the federal review process for the purpose of ameliorating or eliminating adverse impacts. Such consultation would allow the

state to participate in the review of mining proposals.

Response: The regulations provide for agreements between BLM and the states on the processing of Plans of Operations. Agreements could include provisions for consulting with state land managing entities. Section 3809.411 provides for a mandatory comment period on each Plan of Operations.

11.103 **Comment:** There are several problems with bonding for perpetual water treatment. First, there is significant risk in estimating the amount to be covered by the bond. It is difficult to estimate replacement and operating costs for a present-day industrial facility. Attempting to estimate these costs in perpetuity places the public at significant risk of understanding the amount of money needed to operate and replace the water treatment facility. If the bond is insufficient to meet the costs of operating and maintaining the treatment facility, the public will almost certainly be obligated to meet the deficit, or to bear the cost of degraded water quality if treatment is discontinued or degraded. There is also a potential burden on the mine operator in that if the amount bonded is overestimated, the profitability of the mine can be reduced. When bonds are established, an agency not only makes assumptions about the long-term replacement and operating costs of a treatment plant, but the agency must also make assumptions about the average inflation over the period covered by the bond and the average return-on-investment the bond amount will generate over its lifetime. As anyone who follows the financial markets knows too well, there is a considerable amount of instability and risk in both of these assumptions Typically, changing either the inflation rate or the rate for return-on-investment by a single percentage point will cause a huge change on the required bond amount. With a bond for perpetual treatment, ultimately the public bears the risk of these assumptions. In addition, much uncertainty is involved in predicting what the costs might be, what other problems might arise, and the vehicle chosen to provide financial assurance. Second, there is a risk that the financial vehicle used for the bond may not be available or viable when it is required for treatment. Financial institutions, and even government institutions, have a finite life. If these institutions change significantly or fail, the potential for damage (i.e. water pollution) is still there, but the means to meet this need now falls on an institution that was not responsible for the problem.

Response: BLM acknowledges the difficulty in calculating an adequate financial guarantee for long-term, continual, or perpetual water treatment. Sufficient safeguards would have to be built into the cost assumptions and would have a considerable effect on the financial guarantee amount. It would then be up to operators to decided if they want to proceed with the project in view of the significant financial guarantee they would have to provide.

11.104 **Comment:** The best policy for an agency with the responsibility for water protection is to deny any application for a mine that includes a requirement for a long-term water treatment. The long-term risk to the public, who is the ultimate guarantor for any long-term cleanup, is too great. In this way BLM would be best able to "assure long-term post-closure management of mines sites on federal lands" as stated by the NRC report (NRC 1999) in its Recommendation 14, quoted above. Most mines can be designed to preclude conditions that will require long-term water treatment. Accomplishing this is primarily related to designing adequate reclamation of the mine but may also be related to decisions about the design of the operating mine to minimize the contamination of water. If preventative measures cannot be designed into the mine, then BLM should not permit the mine to open. The focus of our environmental laws must be on preventing pollution and habitat degradation.

Response: BLM considered an alternative that would not approve Plans of Operations for mining that would involve long-term or perpetual water treatment. But BLM decided that it is difficult at best to assess the treatment needs upfront and that such a restriction might result in less disclosure of potential water quality impacts. BLM agrees that the mine design and operation should focus on pollution prevention measures, and the regulations have been written to stress this preference. Similarly, the use of some passive treatment systems is desirable even where pollution prevention measures have significantly reduced contaminant loads. BLM did not want to rule out the use of combined pollution prevention techniques such as source control with passive treatment programs. BLM believes that site-specific factors should drive the ultimate decision on the acceptability of perpetual treatment, both for its ability to prevent unnecessary or undue degradation under the new definition and for its cost to the operator.

11.105 **Comment:** 3809.411(d) should be struck and 3809.411(a)(4)(ii) should be changed as follows: BLM completes the environmental review, required under the National Environmental Policy Act, including detailed review of the amount of financial guarantee required. Amendments: Similarly, the public should be notified and given the opportunity for comment any time a Notice, Plan of Operations, or financial guarantee is amended or extended.

Response: Section 3809.411 has been changed to provide for a mandatory 30-day public comment period on the Plan of Operations. Comments will be solicited on the preliminary bond amounts if available at that time. BLM believes it is more useful to collect comments on the operating and reclamation plans themselves instead of on the cost of reclamation. Substantial modifications to Plans of Operations would undergo the same type of review.

11.106 **Comment:** Section 3809.411(d) requires BLM to accept comment on the amount of financial guarantee, and 3809.411(a)(4)(vi) states that BLM may not approve a

Plan of Operations until it completes a review of such comments. These requirements will add extensive time to the BLM review process and increase BLM's workload without increasing the usefulness of BLM's surface management regulations. BLM and the states have expertise in setting financial assurance, and it is not likely that the public will be able to add anything to that process. Moreover, if public comments are believed appropriate, they should be solicited in the same manner and according to the same time frame that apply to other issues in the NEPA process. The financial assurance amount should be established through an administrative process after the NEPA process has closed, similar to the process used in California. The proposed subpart does not mention how BLM will manage or respond to these comments, implying that BLM must consider and respond to each comment. Under what conditions will BLM act on these public comments?

Response: BLM has removed the mandatory public comment period specific to the financial guarantee. Instead, all Plans of Operations will undergo a 30-day comment period as part of the NEPA process along with whatever financial guarantee information exists at that time. BLM will handle comments received just as it handles other public comments on the Plan and environmental analysis.

11.107 **Comment:** Plans of Operation are already required for exploration in the California Desert Conservation Area (draft EIS, Table 2-1, 2nd page). It appears not to be any unnecessary burden on operators to submit exploration plans and reclamation plans now. Why then does the draft EIS assert that developing such plans of operation "would be a complicated and time consuming practice" (3809 draft EIS, page 96) for BLM-managed lands in other parts of the western states? It is likely that most companies that operate in the California Desert Conservation Area (CDCA) also have operations in other western states and are not deterred by the requirement to prepare a Plan of Operations for exploration in the CDCA.

Response: The section sited by the commenter is under Alternative 4 in the draft EIS. Alternative 4 requires a Plan of Operations for any activity greater than staking a mining claim. Alternative 4 also assumes that the operator would bear the cost of the needed environmental analysis for Plan review and approval. The difference between a Notice and a Plan of Operations is that the Plan is a federal action. For a federal action the time frame for review and approval can be much greater than for a Notice, going from 15 days to 60 days or longer if consultation is required under the Historic Preservation Act or an EIS needs to be prepared.

11.108 **Comment:** 3809.411(a)(4) - Items Required. This section leaves the door open to abuse. BLM should specifically state what should be included in a Plan of Operations in Section 3809.401 and then judge the adequacy of each of the submitted Plans using the criteria. Many of these requirements are just not needed for many types of activities.

Response: BLM does state in section 3809.401(b) the information required for a Plan of Operations. Each Plan is judged for completeness by that criterion where it applies. But other information or processes may be required before a complete Plan of Operations can be approved. These information and processes are listed in the proposed final regulations at 3809.411(a)(4). This list has been changed in the final regulations and can be found at 3809.411(a)(3).

11.109 **Comment:** Section 3809.411. In particular, paragraph D is excessive. It is inappropriate to advertise this information to the local public. In my case, the public oppose my operation because they want the material themselves. It is in their best interest to derail the process at every opportunity. Small operations (less than 5 acres of surface disturbance and with no leaching facilities) must be exempt from this level of public notice and comment. The reviewing official has reviewed the guarantee amount; the public should not be involved.

Response: BLM believes the public should be able to comment on all mining operations approved under Plans of Operations. A mandatory 30-day public comment period has been added to section 3809.411. If there is concern over the rights to mine a particular deposit, it must be resolved outside the Plan review process because BLM will not adjudicate rights between rival claimants.

11.110 **Comment:** Any 'implementation' of the millsite opinion in the context of BLM action on a Plan of Operations under the 3809 regulations would be inconsistent with the text and the workings of the existing 3809 regulations. As NMA demonstrated in its May 1999 comments on BLM's 3809 proposal, millsite acreage or ratio is not a lawful basis under the current 3809 regulations for BLM to disapprove or require changes in a Plan of Operations on BLM lands. The February 9, 1999 proposed rule continues the existing framework of current 3809 regulations for the immateriality of the operator's claim position (and how and why of the operator's maintenance of mining claims or millsites or use of unstaked ground) to the review and approval of a Plan of Operations. Both the February 9 preamble and the rule text clearly restate these principles. If BLM intends to change these principles, it cannot make such changes in a final 3809 rule. Instead BLM would have to repropose its 3809 proposal because no alternative to the existing system for establishing one's land and claim position is studied in the EIS or noticed for comment, nor is even the idea of such a fundamental change in the regime for operating a hardrock mine on BLM lands noticed for comment. The only reason the issue was addressed in comments at all was because after the February 9 proposal (and, as to the BLM lands involved, flatly inconsistent with both the existing rules and the February 9 proposal), the Interior and Agriculture Departments undertook the unprecedented and extraordinary action of rescinding a previously approved Plan of Operations in their March 25, 1999, 'Crown Jewel'

letter.

Response: The 3809 regulations are for the surface management of operations conducted under the Mining Law. If the operator has a legitimate and valid right to conduct the activity under the Mining Law, then the regulations are applied to make sure the operation does not result in unnecessary or undue degradation. BLM has not added anything in the final rules on millsite determinations.

11.111 **Comment:** The benefit/cost (B-C) study, draft EIS, or proposed regulations are totally inconsistent with the findings in NRC study Recommendation 4. The NRC study (NRC 1999) recognizes several levels of mining operations that should have an approved Plan of Operations and emphasizes that certain mining operations will be approved after NEPA compliance with an environmental assessment (EA) and finding of no significant impact (FONSI), while others will be approved after NEPA compliance with an EIS. Effective implementation of Recommendation 4 is also strongly interconnected with NRC study Recommendations 2, 3, 9, 10, 11, 13, 14, 15, and 16. The B-C study, draft EIS, and proposed regulations need to be revised to be consistent with NRC Recommendation 4. The new proposed regulations and supporting documents should give criteria that distinguish when a Plan of Operations approved via an EA/FONSI must be amended to prevent unnecessary or undue degradation. The new regulations and supporting documents should consider establishing a requirement that a Plan of Operations approved through an EIS will be modified according to site-specific criteria established in the EIS.

Response: Revised section 3809.431 provides what BLM believes is a more effective criterion for when a Plan of Operations must be modified and is consistent with NRC Recommendation 4. The decision on whether a particular mining operation requires an EA or an EIS is based on the potential for the operation to cause significant impacts as defined under NEPA, and not necessarily by the size or type of operation. Therefore, we cannot set a criterion in the 3809 regulations for mines that require only an EA and mines that would require an EIS to approve. When an EIS-level analysis is conducted the approval decision often provides a discussion on the amount of change in operations the operator can make before a formal modification must be filed.

11.112 **Comment:** NRC Recommendation 10: The experience of NWMA and NMA members is consistent with this recommendation. Early participation in the NEPA process by all interested parties, especially other federal agencies such as EPA, can help prevent 11th hour delays and may, in some cases, reduce litigation over the NEPA decision. But the proposed rule does not address this issue. BLM must ensure that the NEPA process is transparent and should encourage collaboration, thereby benefitting all interests while avoiding last minute surprises. BLM has the authority to include other federal agencies as cooperating entities and any new set

of regulations should direct that all relevant agencies be named as cooperators. Determining such agencies would be a suitable topic for the scoping process.

Response: BLM agrees that early involvement by all parties in the NEPA and permitting processes is desirable. But BLM can merely request the participation of these agencies and cannot make them participate as cooperating agencies. Even when other agencies agree to be formal "cooperating agencies" under NEPA, there can still be problems with receiving timely input or with differences in agency positions on technical issues. The scoping process is currently used to select potential cooperating agencies.

11.113 **Comment:** NRC study Recommendation 10. BLM and the Forest Service (FS) should require all agencies requiring permits on a mining operation to cooperate in the entire NEPA process, and especially scoping. The Benefit-Cost study, draft EIS, and draft regulations do not consider BLM and FS existing authority and responsibility under the CEQ regulation 40 CFR 1501.6. These documents also do not evaluate costs to other federal, state, local, and tribal permitting entities when adopting a priority geared to a BLM or FS action.

Response: Costs to other potential cooperating agencies are not directly within BLM's control and cannot be evaluated by these documents. Potential cooperating agencies can decline to participate because of other program commitments and thus control their own costs. Under 40 CFR 1501.6(b), the lead agency may give some funding to the cooperating agency to mitigate costs, but only to the extent that funds are available.

11.114 **Comment:** Neither the B-C study, draft EIS, nor proposed regulations considered or discussed the issue to be resolved in NRC study Recommendation 10. Accordingly, these revised documents should include an evaluation of how BLM and Forest Service interdisciplinary teams formed to prepare an EIS do or do not include staff and agencies that also must issue permits.

Response: BLM is not certain what such an evaluation would show other than interdisciplinary teams often include staff from other state and federal cooperating agencies, and would continue to do so under the proposed final regulations.

11.115 **Comment:** The revised B-C study, draft EIS, and new regulations should evaluate the steps to be taken by BLM and Forest Service to avoid requests for new information collection and analytical requirements after scoping, after the draft EIS, and at the record of decision so that permits can be timely issued at the end of the NEPA process.

Response: The steps taken by BLM include explaining in the regulations the type of information BLM might require, encouraging early consultation with BLM to establish information needs, and setting a 30-day review period for BLM to give the operator a list

of any missing information.

11.116 **Comment:** The draft EIS and new regulations should show why BLM is not using the requirements of existing guidance in BLM handbook H-1790 and CEQ regulation 1501.6, which emphasizes early and continuing agency cooperation in the NEPA process.

Response: BLM is following its NEPA Handbook and the CEQ regulations for cooperating agencies. But the permitting process can be complicated by the willingness and ability of cooperating agencies to participate in the analysis. Generally, the larger more politically charged the project, the more difficult the interagency coordination becomes.

11.117 **Comment:** The B-C study, draft EIS, and new regulations should show the steps, including any "high-level" commitments, that BLM and the Forest Service need to comply with the mandate in CEQ regulation 1501.6 to resolve the issues raised by NRC study Recommendation 10.

Response: Several years ago BLM, the Forest Service, and EPA signed a national interagency agreement to improve cooperation in the processing of mineral projects. But interagency cooperation is not something that can be mandated by the 3809 regulations.

11.118 **Comment:** The revised draft EIS and revised B-C study especially need to identify and evaluate staff capabilities. [See NRC Recommendation 12 (NRC 1999).]

Response: Expert staff to process Plans of Operations varies from office to office and depends on other workloads. The 3809 regulations cannot address or change staff capabilities, and the issue is outside the scope of the proposed regulations.

11.119 **Comment:** The proposed rule contains no mechanism (nor do its cross-referenced citations) that provide for public notice of the submittal of a Plan of Operations or Notice under the proposed regulations. But section 3809.800 of the draft provides that "Any person adversely affected by a decision made under this subpart may appeal the decision...." Without notice, how is a person or party who may be adversely affected to be aware of the Plan of Operations or Notice activity? Recommendation: A public notice procedure should be established for concerned people, adjoining property owners, and the public at large of the submittal of a Plan of Operations or Notice so that they can participate in the process.

Response: BLM has changed the proposed final regulations to provide for a 30-day minimum public comment period for every Plan of Operations. In addition, the approval of a Plan of Operations is a federal action under NEPA, which provides for public

notification and involvement.

3809.412-Begin Operations

11.120 **Comment:** 3809.412 BLM should notify the operator in writing. Please state whether BLM will notify the operator in writing.

Response: Plan of Operations approvals provided under 3809.411 will contain specific information on whether and when you may start operations. The purpose of section 3809.412 is to advise operators that under no circumstances may they begin operations until the Plan has been approved and the financial guarantee provided.

3809.415 Preventing Unnecessary or Undue Degradation

11.121 **Comment:** 3809.415(b) BLM should clarify what level of incremental activity it wants for judging unnecessary or undue degradation. Please address what time increments will be judged. Please change "reasonably incident" to "logically incident."

Response: The requirement to prevent unnecessary or undue degradation applies to all levels of activity on public lands: casual use, Notice-level activities, and Plan-level activities. The term "reasonably incident" comes from the regulations at 43 CFR 3715 and from Public Law 167, 30 U.S.C. 612. BLM needs to retain this term to maintain consistency.

11.122 **Comment:** Plans of Operations Revise .415(c) to include the White Mountains National Recreation Area. This is another example of the overall flawed character of the proposed regulations and supporting documents. It further illustrates the lack of consideration given to the land ownership and special environmental conditions that apply in Alaska, the state with the largest amount of public and other federal lands.

Response: The list in proposed 3809.415(c) presents *examples* of areas with certain levels of protection required by specific law or statute. It was not intended to be an exhaustive list of all areas where such requirements exist. The local BLM field offices will be responsible for listing such area under their management when they administer the 3809 regulations.

3809.423 Length of Plan

11.123 **Comment:** Successful environmental enforcement is more readily achieved when the responsible party trail is not cold. Recommend permits be for a specific term, possibly annually for "inactive" operations and 5 years for active operations.

Response: BLM considered issuing Plan of Operations approvals with limited periods of effectiveness but could not decide upon a standard duration due to the variability in mining operation sizes and types. BLM believes it is more appropriate to have the operator propose an overall schedule for operations. During the Plan review and approval process BLM would decide whether the duration of operations is reasonable for the mining plan under review. Changes could be made through Plan modifications.

11.124 **Comment:** Section 3809.423 should be revised as follows: Your Plan of Operations remains in effect as long as you are conducting operations [delete , unless BLM suspends or revokes your Plan of Operations for failure to comply with this subpart].

Response: The purpose of this section is to state that the Plan of Operations approval is good for the life of the project as described within the Plan. But should the operator fail to comply with a noncompliance order, BLM can revoke the Plan approval under section 3809.602. BLM believes this action is appropriate where the operator is failing to follow corrective actions issued under a notice of noncompliance.

11.125 **Comment:** 3809.423 How much time will BLM give the operator before revoking a Plan of Operations?

Response: Proposed section 3809.602(a)(1) provides that a revocation may be issued after the time frames in the enforcement order have been exceeded. This amount of time will vary from case to case depending on the specific cause of the violation and the urgency with which it must be abated.

3809.424 Inactive/Abandoned Operations

11.126 **Comment:** Revise .424(a)(3) and (4) to incorporate NRC study Recommendations 4, 5, 15, and 16 and describe the conditions that will cause BLM to unilaterally terminate a valid Plan of Operations. An approved Plan of Operations has financial value to the owner/operator and can be transferred to another owner or operator as part of a total mining package. The Department of the Interior should not have the unfettered ability to unilaterally end a financially valuable part of a mining operation. The proposed 5-year threshold for terminating an approved Plan of Operations is another example where the Department of the Interior has failed to properly consider the economic consequences of unilateral cancellation when the suspended mining operation is not causing unnecessary or undue degradation and BLM has certified that the financial guarantees are adequate. Other comments on the amount of time an operation should be allowed to remain inactive before terminating the Plan of Operations ranged from 3 to 10 years. One comment suggested that the

temporary closure be considered permanent only when the operator advises BLM that it is permanent. Others suggested that 5 years is just the right length of time. A comment was made that BLM should not just review to see if termination is warranted but be mandated to begin termination.

Response: BLM has incorporated NRC's recommendation on interim management plans into section 3809.401 and 3809.424. Because of the recognized value an approved Plan of Operations may have, 5 years is being allowed to pass before BLM conducts a review to see if the Plan should be terminated. Even after 5 years the proposed final regulations do not require the Plan to be terminated, only that a review be conducted to determine if it should be terminated. If there is adequate bonding in place, no unnecessary or undue degradation occurring, and a logical reason to maintain an inactive status, BLM would likely not terminate the Plan and direct final closure. But a Plan of Operations cannot be allowed to remain inactive and unreclaimed indefinitely. BLM must pick a reasonable time after which it can direct reclamation and closure. BLM believes that 5 years is a reasonable amount of time to allow most operators to maintain standby conditions. After 5 years of continual inactivity it will be increasingly difficult to remove equipment, maintain suitable access for reclamation, control weed infestations, preserve topsoil stockpiles, and ensure public safety.

11.127 **Comment:** One proposed alternative approach for interim management plans: (1) An interim management plan should be adopted within 90 days of a decision by the mining company to cease operations because of market conditions or other factors. (This approach is taken in some state programs, such as California's Surface Mining and Reclamation Act, sec. 273(h)) (2) Annually review the operation to determine if the site is viable to restart and assess the operator's intent to continue operations. (3) If, after 2 consecutive years, the operator has not stated an intent to restart mining, reclamation should begin. (4) If the "temporary" closure extends to 5 years, the operator has to demonstrate that the site will be reopened. Otherwise, reclamation must begin. Require that the operator notify BLM and the state of its intent to temporarily cease operations. The operator should be required to obtain approval of an interim management plan that describes what measures will be taken to comply with proposed section 3809.424(a)(1)(I-iii).

Response: BLM is requiring that the operator propose an interim management plan for expected periods of nonoperation as part of the initial Plan of Operations. Should the period of nonoperation not be adequately covered by the interim management plan, the operator would be required to submit a modification within 30 days and at the same time assure that unnecessary or undue degradation does not occur. Under revised section 3809.424(a) the situation would be similar to that suggested by the comment: if the operator could not show that the site would reasonably be expected to reopen, it may be considered abandoned and its reclamation ordered.

11.128 **Comment:** Revise .424(a)(3) to unambiguously explain the difference between inactive and abandoned mining operations and to conform to NRC study Recommendations 4, 5, 15, and 16. Assure that BLM and the Forest Service are uniformly using and applying the same definition.

Response: Under the final regulations at 3809.424(a) an operation is considered inactive if it is not operating (mining, exploring, or reclaiming) but is following its interim management plan. An operation may be considered abandoned for a variety of reasons, including failure to follow or amend the interim management plan or 5 consecutive years of inactivity. Other reasons for considering an operation abandoned may include the inability to locate the operator or the operator's death. These provisions are consistent with the NRC recommendations on inactive and abandoned operations. BLM cannot assure the Forest Service would adopt similar regulations.

11.129 **Comment:** EPA is concerned about the potential for interminable delays that may occur between mine closure and reclamation. The time when mining is terminated and that interval between cessation of mining and restoration needs to be carefully defined as part of the Plans of Operation. There are some difficulties in determining when an operator is finished mining the site. Most mining activities are price-driven in the sense that operators, who are sensitive to world fluctuations of commodity prices, may have to temporarily discontinue their operations for periods of time until prices recover enough to make the operation profitable. These "down times" caused by low commodity prices cannot be determined in advance. Nonetheless, within the Plan of Operations, there needs to be some criteria that determine when extractable resources have been exhausted, and reclamation should begin as per a predetermined schedule. EPA recommends that the final EIS include criteria that define mining activity end-points that are consistent with the applicant's financial objectives and at the same time present a time line for starting reclamation

Response: BLM believes that the final regulations address EPA's concerns. Proposed section 3809.401 requires operators to provide a general schedule of activities from start through closure and an interim management plan for periods of nonoperation. The general performance standard in section 3809.420 requires the operator to perform concurrent reclamation on areas that will not be disturbed further under the Plan of Operations. Final section 3809.424 limits the amount of time an operation can remain temporarily closed without undergoing review to determine if it is abandoned. This combination of requirements means (1) that Plans of Operations must include an extraction and reclamation schedule for agency review and approval, (2) that schedule must describe when mine facilities would be open and when they would be reclaimed, and (3) that reclamation would have to occur at the earliest practical time. In addition, temporarily inactive operations would receive greater scrutiny with defined time limits for periods of inactivity. We believe that these combined requirements will promote timely reclamation

within a defined period after operations cease yet be consistent with the financial objectives of the operators.

11.130 **Comment:** Revise .424(b) to make it clear that the obligations of the owner/operator are only those contained in the approved Plan of Operations and associated financial instruments. The Department of the Interior does not have unilateral authority to change that contract and is, as the land owner, liable for any costs above and beyond that contract as long as the owner/operator uses reasonable and customary methods to comply with the contract. Operators, as well as regulatory bodies, need to bring an operation to closure and not be required to monitor a site in perpetuity. Without well-defined closure or success criteria, operators will have a difficult if not impossible time securing reclamation bonds. Assurance must be made that if an operator complies, the bond, as well as liability, will be released.

Response: The comment is incorrect if the intent is to state that the operator's liability is limited to the amount of the financial instrument. The operator is responsible for preventing unnecessary or undue degradation. This responsibility includes complying with environmental standards such as water quality and air quality standards and reclaiming the site to the performance standards in 3809.420. The financial instrument is an enforcement tool to back up the operator obligations if they are unable or unwilling to meet the regulatory requirements. The bond does not represent the limits of the operator's responsibility, but merely gives BLM some level of assurance that the work will be performed. If the reclamation bond is not adequate to perform the reclamation work, the operator is liable for the unfunded portion needed to meet the minimum regulatory requirements. Success criteria and postclosure monitoring requirements should be established as a result of the Plan of Operations review process. Once a closure plan has been implemented, no more work or monitoring may be needed by the operator. But the operator cannot be released from the liability for future problems that might develop on that site.

11.131 **Comment:** Plans of Operations. BLM should not be mandated to forfeit the bond within 30 days of the determination. We recommend a statement saying that BLM may initiate forfeiture under this section. This way BLM could take enforcement action before forfeiture.

Response: Section 3809.424(a)(4) provides only that BLM *may* initiate forfeiture under 3809.595.

11.132 **Comment:** Plans of Operations "Inactive" status under the Mining Law may constitute "abandonment" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), where a release or threat of a release exists because of inadequate controls for public safety, health, and the

environment.

Response: A release or threat of release under CERCLA would also constitute unnecessary or undue degradation. The interim management plans required under 3809.401(b)(5) must address management of toxic or deleterious materials during periods of temporary closure, including measure needed to prevent a release or the threat of a release. Operations that have a release, or threaten release, may be considered abandoned by BLM and subject to immediate forfeiture of that portion of the financial guarantee needed to stabilize the area and to prevent or correct the release.

11.133 **Comment:** Plans of Operations The NRC study (NRC 1999) notes that a mining operation may be influenced by a variety of economic conditions such as world metal market prices. Accordingly, a definition that ignores economic factors will be arbitrary and capricious. The key decision that BLM must make is if unnecessary or undue degradation (UUD) is likely? The answer is not time dependent but is site specific, considering the ore body and status of ore extraction. The owner/operator has a second economic consideration that needs evaluation in any definition of temporary versus permanent–the financial guarantee. The owner/operator also has an outstanding economic investment in the mineral property interest that must be considered. As long as there is no UUD and there is adequate financial guarantee (both are certified by BLM in its annual inspection), it appears that the distinction is unneeded. If UUD is documented or professionally determined by BLM to be likely, then appropriate action should be immediately initiated by the owner/operator.

Response: BLM agrees with this concern. That is why the regulations at section 3809.424(a) require a review after 5 years instead of automatically mandating that closure take place.

11.134 **Comment:** NRC report Conclusion - p. 90 [f] NMA is not opposed to procedures for abandonment, temporary cessation of operations, or a specified time frame for expiration of a notice. As the NRC report recommends, however, BLM must work with states to determine how best to plan and define those circumstances when temporary closure becomes permanent. States already have extensive experience in this area. NMA has concerns with the abandonment provisions as currently written in BLM's proposal. NMA believes that those abandonment provisions are unwarranted in light of the provisions governing temporary cessation of operations and expiration of notice. A new federal program is not needed and would only duplicate these existing state programs and authorities.

Response: BLM agrees that temporary closure is one of the items that must be coordinated with the states. This has been specified in section 3809.201 as one of the

items that should be covered under federal-state agreements. But BLM believes it must have its own procedures in place to address ongoing problems with inactive and abandoned operations as documented by the NRC report.

11.135 **Comment:** Plans of Operations An interim management plan is a significant burden if not current or not required because unnecessary or undue degradation has not occurred or is expected. For example, it is inappropriate to require an interim management plan in all Plans of Operations because of some future speculative chance that the mining operation may be suspended. Further, any interim management plan prepared as part of the Plan application would likely not be adequate at some unspecified date since unnecessary or undue degradation is a factor of the ore body and ecosystem and stage of the mining operation when the owner/operator suspended the activity.

Response: BLM believes that interim management plans do not impose a significant burden on operators if prepared as part of Plans of Operations. This way a single NEPA document and a single review process can be used to process the entire Plan of Operations, instead of treating the interim management plan as a Plan modification later, with its own review periods and NEPA documentation requirements. In planning to mine, operators should also be able to plan under what conditions they might temporarily not mine, and how they would manage the site to prevent unnecessary or undue degradation during the temporary closure. If conditions change at temporary closure, the interim management plan could be easily modified to address the new conditions or circumstances. More importantly, by considering possible interim management needs during the project planning phase, operators are better prepared to address temporary closure should it become necessary.

11.136 **Comment:** An interim management plan should be site specific, considering the likelihood of unnecessary or undue degradation, and then only to the extent suitable for the mining operation that has suspended operations. Factors, such as the implied requirement to remove equipment and/or facilities are inappropriate as these are issues that were, or should have been considered in the BLM Plan of Operations decision for final reclamation. BLM needs to consider economic costs to the owner/operator. The revised draft EIS and revised B-C study need to clearly describe and evaluate the situations that BLM and the Forest Service might consider equipment or facility removal during temporary suspension.

Response: It is not possible to explain in advance all situations where removal of equipment might be required. But under the added interim management plans submitted as part of the Plan of Operations, the operator will propose the provisions for storage or removal of equipment, supplies, and structures during temporary closures.

11.137 **Comment:** Some commenters said that they did not see the need to prepare interim

plans during periods of inactivity, as recommended by the NRC report (Recommendation 5) except under a genuine threat of environmental harm at an inactive site. Some commenters said that having a separate plan for unforeseen interim closures would be duplicative. Commenters also felt it was not necessary to define conditions under which temporary closure becomes permanent, triggering the requirement for final reclamation. Commenters believe BLM should not define when extended periods of nonoperation should trigger closure requirements, even though they point out that the NRC report recommended (Recommendation 5) that BLM define such conditions (3809.334, 3809.424).

Response: BLM believes the NRC was correct and that it is appropriate to have interim management plans prepared for both planned and unplanned temporary closures as part of the Plan of Operations. BLM has defined 5 years as the longest period an operation can go without a review to evaluate whether final closure should be directed. This period gives operators a reasonable amount of time to await changes in financial conditions yet provides flexibility in that closure is not necessarily mandated after the 5-year period.

11.138 **Comment:** BLM must be consistent with NRC report Recommendation 5. Following the recommendation would add clarity and provide useful guidelines. The proposed rule is inadequate in this regard. BLM should allow for extended periods of temporary closure.

Response: BLM has added to the Plan of Operations content the requirement to include interim management plans for periods of nonoperation. These interim management plans could include provisions for extended periods of temporary closure and could be modified should the operator need to extend the planned closure period.

3809.431 Must Modify Plan

11.139 **Comment:** The draft EIS must consider impacts to existing operations and evaluate how existing operations would be affected by proposed changes to the 3809 regulations. The NWMA encourages BLM to develop a grandfathering alternative that applies to all existing operations. Should the revised 3809 regulations mandate prescriptive performance standards, some element of grandfathering is needed for both existing sites and sites at which a plan modification is filed in the future because it may be impossible or impractical to retrofit existing operations to comply with the new standards.

Response: BLM does consider the impacts of the grandfathering provisions under each alternative to the level of mineral activity as shown in Appendix E of the EIS. BLM has developed in final 3809.433 a grandfathering approach for applying the new regulations to existing operations. This approach includes a review of economic, environmental, safety, or technical factors before applying the new regulations to Plan modifications.

11.140 **Comment:** The proposed rule should delete the requirement to impose the new 3809 program on existing facilities [proposed Section 3809.431(b), .433(b)]. These new rules should not apply to current mining operations. Some companies have spent millions of dollars to explore and put mines into operation, and the new rules will make mines economically unviable. It is not fair to change the rules in midstream and destroy people's lives and families.

Response: There is no requirement to impose the new 3809 rules on existing facilities in 3809.431(b). The requirement in this paragraph is to modify the Plan to prevent unnecessary or undue degradation. The definition of unnecessary or undue degradation that was in effect when the Plan was approved would guide BLM's determination that a Plan was not preventing unnecessary or undue degradation. For operator-initiated modifications BLM has developed in final 3809.433 a grandfathering approach for applying the new regulations to existing operations. This approach includes a review of economic, environmental, safety, or technical factors before applying the new regulations to Plan modifications.

11.141 **Comment:** 3809.431(b) Is this section retroactive onto private lands? This is very unclear. Please help the operator understand what you mean here.

Response: No, the 3809 regulations apply only to operations on lands managed by BLM. See also 3809.2.

11.142 **Comment:** In the preamble BLM asserts that the proposed rule eliminates the above "procedures" relating to required modifications because the "procedures are unnecessarily detailed and cumbersome" and the "proposal would allow BLM field staff flexibility to streamline the modification review process." Casting the eliminated provisions as "procedural" is just flat wrong. These provisions, as we have just shown, provide justifiable and substantive protections to operators that have expended enormous sums in designing and building facilities according to BLM-approved plans. BLM should not be allowed to wipe the slate clean merely because it changes its mind in a situation where all impacts were foreseen from the start. The existing provisions have worked well over time to allow BLM to protect the public lands from unforeseen events without disturbing the legitimate expectations operators gain through approval of their plans and their resulting investment of significant sums in mining. There is no reason to remove those protections now.

Response: NRC Recommendation 4 is that BLM revise its modification requirements to provide more effective criteria for modifications to Plans of Operations. NRC stated that the current procedures are not straightforward even with compelling environmental justification.

11.143 **Comment:** The closure plan should include all actions to both reclaim and remediate any outstanding environmental issues. Bonds should adequately cover closure costs including long-term O&M or treatment. Definition needs to be added to glossary.

Response: Section 3809.431(c) has been added to require modification before final mine closure to address unanticipated events or conditions, or newly discovered circumstances or information that must be considered by final reclamation.

11.144 **Comment:** The agency's authority to direct an operator to modify its approved Plan must be subject to some constraint. BLM must reinstate procedural protections in this rule. Operators are entitled to due process, including some written specification on how and why the agency has determined that operations it previously approved as not causing unnecessary or undue degradation of BLM-managed land is suddenly causing such degradation. The rule must require the agency to state in writing, in any such directive to modify a Plan, how and why the modification is being directed. Because the due process and notice protections in the proposed rules are insufficient, BLM's proposals are inconsistent with the NRC recommendation. In other words, why is the issue at hand unforeseen and how is the directive not simply a change in judgment about what impacts the agency has decided are acceptable and what are not. In addition, the agency has not explained how and why the existing provisions of section 3809.1-7(c) are unworkable or have frustrated the agency's enforcement efforts.

Response: The requirement under 3809.431(b) to submit a modification to prevent unnecessary or undue degradation would, when exercised, contain a detailed description on why BLM believes the modification is needed. Operators could then appeal this decision to the state director if they did not agree with the order of the BLM field manager. This approach is consistent with the NRC (1999) recommendations. This change is needed because although certain issues, such as acid rock drainage, may have been addressed during the prior Plan approval, changes in predictive techniques made in the 20 years since initial Plan approval now reveal past inaccurate assessments of the potential environmental impacts. Likewise, reclamation science and mitigation techniques have been evolving to where approaches not viable when operations were permitted are not only viable but essential to successful reclamation.

11.145 **Comment:** Section 431 creates a separate and inconsistent standard for modifications to Plans of Operations by allowing BLM to require a modification to "minimize environmental impacts, [or to] enhance resource protection." BLM may require a modification only to prevent unnecessary or undue degradation.

Response: Section 3809.431 does not use the terms suggested in the comment, but requires modifications to prevent unnecessary or undue degradation and to account for

unanticipated conditions or newly discovered circumstances or information.

11.146 **Comment:** At the BLM public hearings on the proposed regulations, BLM officials repeatedly stated that existing operations would not be affected by the rule changes. Unfortunately, the language of the proposed regulations does not support this statement. Proposed 3809.431(b) essentially creates a Catch-22 situation for any operator. Without any limits on BLM's discretion, the provision provides that a Plan of Operations must be modified if BLM concludes it does not prevent unnecessary or undue degradation. But given the proposed modifications to the definition of unnecessary or undue degradation and the related performance standards, BLM might be able to require modification at anytime that may include the new performance standards. The proposed rule must be clarified to limit BLM's ability to impose the new performance standards on existing operations by the mere fact that they do not comply with the new proposed performance standards.

Response: Revised section 3809.400(a) makes clear that existing operations are exempt from the new performance standards. A modification required under the 3809.431(b) would be tied to the previous definition of unnecessary or undue degradation.

11.147 **Comment:** We suggest that the regulations be changed to clarify when changing conditions warrant a change in operations. A single mine in a basin does not have the same impact as several. It seems equitable to require changes throughout the basin rather than to put all of the mitigation requirements on the last mine to be permitted.

Response: Section 3809.431(c) has been added to provide some examples of when a change in conditions or circumstances would require a modification. Changes would be allocated in response to site-specific circumstances.

11.148 **Comment:** 3809.431 Most operations at some time change their Plans of Operations (for expansion of scale of operations, extending mine life, or, as frequently happens, an open pit mine finishes its life as an underground mine), so eventually most but not all existing mining operations will be affected by the 3809 regulations soon after they are issued.

Response: Section 3809.433 describes how the regulations would apply to new modifications of existing Plans of Operations.

11.149 **Comment:** Some commenters recommended no periodic reviews. Others felt that if BLM imposes periodic review of Plans, reviews should be no more frequent than every 5 years. As a practical matter, Plans of Operations are amended relatively often to reflect changing economic and geologic conditions. Mandatory

periodic review creates an undue burden on the entire industry and on BLM. Changing environmental conditions or standards can be considered in evaluating Plan amendments submitted by the operator.

Response: BLM has decided not to require mandatory periodic review. Revised section 3809.431 provides for BLM to require modifications to existing Plans of Operations to prevent unnecessary or undue degradation and when unanticipated conditions or situations arise.

11.150 **Comment:** The NRC Committee recommends that BLM provide "more effective criteria for modification to plans or operations, where needed, to protect the federal lands." The NRC report's discussion of this recommendation makes it clear that the Committee was concerned with provisions in the current regulations that require the BLM state director to make certain determinations for the initial plan approval. Since the underlying standard for all Plan approvals is the prevention of unnecessary or undue degradation (UUD), the regulations should provide that a plan must be modified when UUD will result from continued operations under the approved Plan. Under the existing definition of UUD, this criterion for plan modification makes sense–plan modifications would be triggered by violations of federal or state environmental standards or a failure of the reclamation plan. Unfortunately, the revised definition of UUD proposed by BLM in this rulemaking would make this straightforward test impossible to administer because the definition is essentially circular (i.e. unnecessary or undue degradation is whatever BLM says it is). Proposed 3809.431 is unworkable and inconsistent with the NRC Committee's recommendation for more effective criteria.

Response: BLM does not agree that the modification language is unworkable with the new definition of unnecessary or undue degradation. If anything, the definition in the final regulations provides a more direct basis for evaluating whether a modification is needed by being tied directly to the performance standards in section 3809.420, as well as to compliance with other federal and state laws. The Plan modification provisions in the final regulations remove the state director determinations for the initial plan approval that were of concern to the NRC.

11.151 **Comment:** A proposal to provide more effective criteria for modifications to existing Plans of Operations raises a couple of issues. First, is there a demonstrated need for additional review? It is clear that if there is a new disturbance or new operations beyond that of an existing Plan of Operations, a modification is already required. Second, is BLM staffed to handle the added workload created by periodic review?

Response: The requirement to file a modification is not limited to just a change in the area of disturbance. A modification must also be filed for changes to the operation not

already described in the approved Plan of Operations. Seemingly minor changes in the operation can produce environmental impacts that were not contemplated in the initial Plan approval and must be reviewed and approved before implementation. BLM is not proposing a periodic review under a set time frame.

11.152 **Comment:** The B-C study, draft EIS, and proposed regulations fail to consider setting a threshold that clearly defines when an approved mining operation must be modified or when an approved mining operation is "temporarily" suspended and interim reclamation required versus "permanent" shutdown and final closure/ reclamation (see NRC study Recommendations 4 and 5). As a contract, the responsibility of BLM and the Forest Service have not been evaluated when the owner/operator has fully complied with the contract, and BLM has so certified by decision and release of the financial guarantee for that project element. Under those conditions, BLM would be entirely responsible for any later event on the reclaimed mine area.

Response: The regulation development did consider establishing a threshold for temporary and permanent closure. The regulations at 3809.424 are the result and are consistent with the NRC recommendations. The operator is fully responsible for any environmental problems that develop at the site regardless of the amount or status of the financial guarantee.

11.153 **Comment:** Plans of Operations Amend .431 to be consistent with NRC study Recommendation 4. Assure that the final modification is the same for both the FS and BLM and is uniformly applied.

Response: 3809.431 as revised is consistent with NRC Recommendations 4 and 14 in providing a more straightforward process for BLM to require a modification and in addressing post-closure management needs of the mine site. BLM cannot assure that these recommendations would be applied to Forest Service-managed lands.

11.154 **Comment:** Currently there are no serious consequences to an operator if a change in the Plan of Operations is labeled a modification. If 'modification' of a plan means having one's claim position examined under the counter-productive and unauthorized standards of the Solicitor's millsite ratio concepts, then the definition becomes critical. An operator might forgo improvements in efficiency to its operation, including reductions in environmental impacts or improvements in efficiency (reducing the volume or distance of waste rock or ore hauls), if proposing a 'modification' to its existing plan would force BLM to get into claim position reviews never before undertaken, and never before deemed relevant under the 3809 regulations in the siting and environmental clearance of existing and planned facilities. In the same vein, if these distinctions between exempt and nonexempt changes to one's Plan of Operations are to be based on new terms not

now employed in BLM regulations, such as 'amendment' or 'revision' of a Plan of Operations, then those terms, too, need to be defined by rule after notice and comment.

Response: The final regulations do not contain a set review requirement for millsite acreage limits. BLM would review any modification filed for a Plan of Operations in the context of the need to prevent unnecessary or undue degradation. The degree to which any acreage limitations on millsite claims and use under the Mining Law apply to a project for which a Plan modification has been filed would depend on the meaning of section 337 of the Fiscal Year 2000 Interior Department Appropriations Act and not the 3809 regulations.

11.155 **Comment:** Similarly, if BLM intends that it be notified for every minor, nonsignificant modification to operations, the local BLM office will be inundated with information on these types of insignificant changes. As Phelps Dodge Mining Company commented previously, BLM's proposal to limit the scope of the changes that require notification by using the phrase "substantive change" will not work because virtually everything in a Plan of Operations is substantive. Moreover, BLM already has adequately addressed this issue and recognizes that operational exigencies often result in the need to make minor modifications to Plans of Operations. BLM now imposes no obligation on the operator to advise the agency of such changes. Revising that requirement again places more burdens on the BLM staff. Consequently, the regulation needs a qualitative adjective to distinguish matters of minor substance from those significance that need to be reported. The provision must be modified to clearly state that only "significant" modifications of Plans of Operations require BLM review and approval.

Response: The test for how a modification submitted under the final regulations at 3809.431(a) is processed does not rely on whether the project component being modified is "substantive," but on whether the "change" itself would be substantive from that already approved. BLM anticipates that an operator could make three levels of changes or modifications to a Plan of Operations. The first are changes within the confines of the approved Plan of Operations. These changes do not require any notification to BLM because they are within the scope of the existing Plan approval. The second are changes that, while not substantive enough to require supplemental NEPA analysis, must be reviewed by BLM for consistency with the approved Plan of Operations to ensure against unnecessary or undue degradation. The third type of modification involves a material change in operations, either in extent, intensity, duration, or type of activity such that the change is not within the scope of the existing approved Plan of Operation and requires formal review and approval. This is not much different from the existing regulations. Operators are already supposed to be contacting BLM before making changes in the Plan of Operations that exceed the scope of their existing approvals. The threshold for each of these levels is site specific, and operators should contact the local BLM office if they have

questions on the change in operations they would like to make.

11.156 **Comment:** Plans of Operations The proposed regulations specify there shall be an annual review. The proposed annual review, among other things, also provides for revising the outstanding financial guarantees for the Plan of Operations. The annual review should specifically address the adequacy of the approved Plan in the light of actual on-the-ground performance. Annual review continues to be appropriate because it gives the operator/owner an opportunity to receive a written report from BLM that unnecessary or undue degradation is not occurring and is not professionally expected in the foreseeable future under the approved Plan. This is also the time that the financial guarantee is adequate or needs modification to recognize required reclamation achievements over the past year or adjustments to recognize an increase in the disturbed area that is beyond that in the approved Plan. It also will go along way to satisfy the deficiency in the ability of BLM and the Forest Service to document and timely and factually report on the status of mining operations to the other federal, state, local, and tribal entities that have issued permits for that operation as well as Congress and interested publics addressed in NRC study Recommendations 11, 15, and 16.

Response: There is no requirement for an annual review. BLM will periodically review the operations for needed modifications to prevent unnecessary or undue degradation and to verify that the financial guarantee is adequate to cover the reclamation liability. However, because of the site specificity of the mining operations on public land, BLM did not feel it would be appropriate to specify a set time interval for project reviews.

11.157 **Comment:** NRC Recommendation 4: The WMC supports this recommendation to require an operator to modify a Plan of Operations if there has been a substantial change in the proposed activity or anticipated impacts to the environment. But the guidelines for when a modified Plan of Operations is needed should provide a process whereby some changes can be handled during annual reviews and updates to minimize industry and agency time devoted to evaluating minor changes. Additionally, this requirement to modify a Plan of Operations must be coordinated with state permitting requirements to avoid unneeded duplication of effort. For example, in Nevada, key permits for mining and exploration projects must be regularly renewed or updated. (A Water Pollution Control Permit must be renewed every 5 years; a Reclamation Permit must be updated every 3 years). The Plan modification process should be coordinated with these state requirements to minimize duplication.

Response: Where annual or periodic reviews are used, they should be used for updating agencies on operations that have occurred within the scope of the approved Plan of Operations. For operational changes that would exceed the scope of the approval, operators should contact BLM and the suitable state agency well in advance to determine

what, if any, modification requirements need to be followed.

11.158 **Comment:** As part of its recommendation that BLM revise its criteria for modifying approved plans, the NRC advises that BLM must ensure that any modifications are in fact reasonable and feasible. If, therefore, BLM decides to implement the NRC study's recommendation that it modify the criteria for plan modifications, BLM must also implement the study's recommendations that the modified criteria contain feasibility and reasonableness limits on what modifications BLM can require.

Response: The criterion change from the existing regulations is that the modification is needed to prevent unnecessary or undue degradation. This change does not fundamentally differ from the existing regulations, but involves less review by the state director on whether the issue should have been addressed previously. The change acknowledges that operational information often gives new information or circumstances that could not have reasonably been known when the initial Plan of Operations was approved, especially for operations whose duration exceeds 20 years. The criterion is still to prevent unnecessary or undue degradation. Nor can this provision be used to apply the new definition of unnecessary or undue degradation to preexisting operations.

11.159 **Comment:** Proposed 43 CFR 3809.431. The proposed rule is vague in defining under what circumstances a modification would be required. Clearly the creation of a new facility (waste rock dump, heap leach pad, etc) or expansion of an existing facility would require a plan modification, as provided for in proposed 3809.433. In addition, the following kinds of activities should trigger plan modifications and review: Boundary adjustments, Changes in a financial assurance, temporary closure (which would trigger a modification for "interim" operations)

Response: BLM does not intend for administrative actions, which do not approve or create any on-the-ground impacts, to trigger a Plan of Operations modification such that the NEPA analysis would need to be supplemented or the public comment period would need to be reopened. Examples of such administrative actions include a change in operator, financial assurance adjustments, property boundary changes, or enforcement actions. These actions are clearly within the scope of implementing the approved Plan of Operations. A modification would be triggered by the material change in operations outside the scope of the existing approved Plan of Operations, or by unexpected events or conditions that require such changes as described in revised section 3809.431(c).

3809.432 Modification Process

11.160 **Comment:** Under 3809.432(b), BLM should give a facility operator an approval or disapproval to a requested plan modification. The degree of administrative

review would, of course, vary, depending on the magnitude of the requested plan modification, but a facility operator should be informed that a requested plan modification has been either approved or disapproved. Otherwise, the facility operator may be operating unknowingly in violation of approved permits.

Response: BLM agrees that operators need to be advised of the outcome of their modification requests. Under 3809.432(b) BLM will notify operators of the acceptance or rejection of proposed nonsubstantive changes in Plans of Operations. BLM does not intend to issue approvals or denials of minor changes but to merely screen them for conformance with the exiting approved Plan and advise operator if changes are acceptable without undergoing the formal review and approval process in section 3809.432(a).

11.161 **Comment:** The proposed rule should clarify the scope of its Plan Modification rule to proposed Section 3809.401.

Response: For a modification, all applicable information in section 3809.401 must be provided.

11.162 **Comment:** The new regulations do not address the issue of modifications when a Plan is under appeal. We recommend that BLM deny any substantial amendments until appeals are settled and that this provision be added to the proposed regulations.

Response: Under current procedures, when a BLM decision is under appeal before the Interior Board of land Appeals (IBLA), BLM does not take any other action on similar matters. For example, if a modification approval for a mine expansion is under appeal before IBLA, BLM would not approve a second modification while the appeal on the first one is still pending. The exception to this requirement is that BLM can still take whatever action needed to prevent unnecessary or undue degradation.

11.163 **Comment:** 3809.432(a) Define "minimally." BLM is applauded for not requesting more public comment on the financial guarantee amount under this subpart for a modification to a Plan of Operations that does not or only minimally changes the financial guarantee amount. But because the word "minimally" is open to differing interpretations, it would be helpful if BLM would pick a certain percentage of the guaranteed amount (20% or 80% were suggested) in not triggering public comment. Or it should mean that if the scope of the land disturbance has not changed, or the improvements to the land reclamation can be achieved by allowing the modification, this should be minimally. Also, BLM should use the NEPA compliance process to determine whether the proposed modification is "minimal." If a supplemental EIS is required, it would not be minimal; whereas if only an environmental assessment/finding of no significant impact (EA/FONSI) is required is would be minimal. Or BLM should not solicit

public comment on the financial guarantee unless the proposed change in the Plan of Operations triggers an EA or EIS.

Response: In response to comments on proposed section 3809.411(d), BLM has removed the requirement for public review on the amount of the financial guarantee. BLM has also deleted reference to public review from the last half of proposed paragraph 3809.432(a), which included the term "minimally." Therefore, comments on defining this term are no longer relevant. Plan modifications processed under the final regulations at 3809.432(a) would still have public comment periods, and comments on the financial guarantee can still be provided during the 30-day comment period.

11.164 **Comment:** Define "substantive." Revise .432(b) to define a substantive change as one that does not require either an EIS or a supplement to a prior EIS and include this concept in 3809.5. It is self-evident that the proposed change is not substantive when BLM uses an EA/FONSI for NEPA compliance.

Response: A substantive change is one that exceeds the scope of the approved Plan of Operations. It may require that either the EA or the EIS analysis be supplemented. Even if the impact is not significant and can be analyzed by an EA, the change could be substantive compared to the initial approved Plan of Operations.

11.165 **Comment:** Requiring such detailed Plans to be submitted increases the likelihood that when circumstances encountered differ from those projected by the exploration work, the details of the Plan will require changes. Under the draft rules, any substantive change may require reinitiation and completion of the same process required for initial Plan of Operations approval. Section 3809.432. This process can obviously be extraordinarily expensive and time consuming. The draft rules should either reduce the level of detail required in Plans of Operations or should ease the procedural requirements for Plan modifications.

Response: BLM notes that though a substantive change may require review and approval similar to the process followed for the initial Plan of Operations, only the information pertinent to the modification need be submitted under 3809.401(b). Furthermore, the NEPA analysis for the modification may be able to use or supplement existing documents, serving to facilitate the modification review. BLM does not believe the information requirements in section 3809.401 are overly detailed. Plans of Operations may be proposed in a manner that preserves the flexibility of operators to make minor adjustments without exceeding the scope of the Plan approval.

11.166 **Comment:** Proposed 3809.432(b) would require operators to go through the formal BLM approval process before implementing any "substantive change" to their approved operation plans. That requirement is a substantial departure from the existing 3809 program, which requires review and approval only of

"significant modification[s]." We do not know whether BLM intended the term "substantive" to mean the same thing as "significant." But Newmont Gold is concerned that the term "substantive" can fairly be construed as meaning any change that is not strictly procedural. Thus, were the word substantive to remain in the regulations, an operator might have to go through a formal BLM approval process to add 10 square feet to a storage shed. That would simply waste both the operator's time and BLM's resources. We urge BLM to rewrite proposed 3809.432(b) to clarify that only "significant" changes to a Plan of Operations require formal approval.

Response: A substantive change or modification is one that is outside the scope of the approved Plan of Operations. It is very similar to the "significant modification" under the existing regulations. But BLM decided to use "substantive" instead of "significant" because of the potential for confusion over "significant impacts" as used in NEPA to trigger preparation of an EIS. It has never been BLM's policy or intent under the existing regulations that a change has to exceed the EIS significance trigger before a modification is required. The use of the term "substantive" removes the potential for this confusion. For the commenter's example, if the size of the storage shed were an issue during Plan approval such that a specific size criterion had to be established to meet the performance standards, then, yes, an increase in its size would require a modification under 3809.432(a).

11.167 **Comment:** Review Process for Modification of Plans of Operations. 3809.432 should be modified to include time frames for BLM's review. BLM needs to return to the current language, which recognizes the reality of ongoing mining operations, where minor operating changes are made constantly as a matter of course. The new regulation should not create a system that even implicitly requires the operator to constantly barrage the local BLM office with nonsignificant changes.

Response: For a substantial modification, BLM would follow the time frames for review in section 3809.411. BLM recognizes that day-to-day operations often include minor changes. But anytime the operator makes a change in operations that goes outside what was provided for in the approved Plan of Operations, the change is substantive and the operator must contact BLM. If the substantive change is sufficient to require more analysis under NEPA, then it is processed in the same manner as the initial Plan of Operations. If the change is a minor modification consistent with the approved Plan of Operations, it can be handled expeditiously as a compliance matter between the operator and BLM.

11.168 **Comment:** The term "substantive" just does not make sense in this usage. Virtually everything in a Plan of Operations is substantive. The regulation needs a qualitative adjective to distinguish matters of minor substance from those of

significance. The provision must be modified to clearly state that only significant modifications of a Plan of Operations require BLM review and approval.

Response: The operative part is substantive "change," which is a change from the approved Plan of Operations. BLM does not want to use the term "significant" because of possible confusion with the NEPA threshold for preparing an EIS.

11.169 **Comment:** BLM does not permit small miners to make minor modifications to approved Plans of Operations without requiring extensive reprocessing. Because NRC has reported something other than what actually does occur for all small miners, they have therefore failed to comply with P.L. 105-27. And, because NRC has failed to comply with P.L. 105-227, the NRC study is unreasonable, and as such it cannot be incorporated.

Response: The final regulations would apply to all Plans of Operations, those of small-scale operations as well as large-scale operations. Modifications to Plans are judged on an individual basis as to the need for more environmental review. BLM is not certain in what respect the NRC report has misrepresented the process for small miners. But since Congress has required that BLM rules not be inconsistent with the NRC recommendations, BLM must consider to the NRC report in any rulemaking.

. **3809.433 New Modification to an Existing Plan**

11.170 **Comment:** We oppose BLM's proposed revisions to the 3809 regulations because they will require changes and revisions to extensions and modifications of previously approved Plans.

Response: Previously approved Plans would be subject to the new regulations under a practicality test at 3809.433. If applying the new regulations to modifications of previously approved Plans were not practical for economic, environmental, safety, or technical reasons, it would not be required.

11.171 **Comment:** The proposed rules allow BLM to apply the proposed new performance standards to existing facilities when they are modified. The addition of new and detailed federal standards that could be applied to future expansion or modifications of existing operations that have already been permitted under existing federal and state standards raises a serious concern that new federal standards will be applied retroactively to previously authorized and permitted operations.

Response: The new performance standards would not be applied to modifications of existing mine facilities if they could not be practically incorporated taking into account

economic, environmental, safety, and technical factors. See final 3809.433(b).

11.172 **Comment:** Firm language is needed to ensure that new units and all modifications follow revised regulations.

Response: The new rules for project administration elements such as reclamation bonding and enforcement would apply to all existing operations and future modifications. The new performance standards would not be applied to modifications of existing mine facilities if they could not be practically incorporated taking into account economic, environmental, safety, and technical factors. See final 3809.433(b).

11.173 **Comment:** BLM always has had and will retain the ability to inform operators that their Plans are incomplete and require more information. The effective date of the rule as a cutoff is really the only date that recognizes the time and effort placed into Plan development by the operator. The Plan "modification" transition provisions also are unworkable and must be changed. Here BLM proposes to make the new rules applicable to existing facilities that apply for a Plan modification. This proposal seems counterproductive if BLM's goal is the prevention of unnecessary or undue degradation. This transition provision gives no incentive to remove or update older facilities, thereby avoiding or significantly reducing additional surface disturbance. Grandfathering additions to existing facilities provides an incentive that will likely result in upgrading those facilities and reducing total disturbance to surface resources on the public lands. Modifications of existing facilities should be under existing law. Finally, BLM asked whether it is creating too much confusion with the transition provisions that allow different facilities at the same operation to function under different rules. The answer is yes, and the preferred solution would be to grandfather all existing operations and their modifications. The confusion is far preferable to the blanket imposing of new standards at all operations.

Response: In the final regulations BLM has provided for an exemption from the performance standards for a modification to which the standards cannot be practically incorporated. But BLM believes that modifications to existing mines should incorporate the performance standards whenever practical. During review and approval of a particular modification, BLM would consider the benefits of modifying existing mine facilities over building a new facility, in evaluating the potential for unnecessary or undue degradation.

11.174 **Comment:** Preparing a mine project's Plan under the current rules involves tremendous amounts of time and effort. The changes to the 3809 rules being proposed by BLM could trigger significant added investment (of money and time) to conform the Plan of Operations to the revisions. The proposed transition provision would require that operators who have already submitted Plans of Operations for which EAs or draft EISs have not been made available, would be

obligated to conform their projects to the revised rules. In other words, the transition provisions would essentially require operations for which BLM has not released EAs or EISs to begin the approval process anew without regard to the circumstances of the operation or activity. The proposed requirement is evidence that BLM has not evaluated the resources that companies invest in submitting Plans of Operations for approval. Barrick recommends that the new requirements should apply only to the submission of new Plans of Operations after the effective date of the new rules.

Response: BLM has considered the comments on this issue and the amount of resources companies invest in submitting mine plans. We have changed the final regulations to allow for Plans of Operations submitted before the effective date of the final regulations to continue under the previous 3809 regulations' Plan content and performance standard requirement. Furthermore, we have changed 3809.433(b) to exempt modifications to existing Plans from performance standards based upon economic, environmental, safety, or technical factors that would make it impractical to apply the new performance standards.

11.175 **Comment:** Under the Proposed Action , if an existing facility is modified after the effective date of the proposal, the entire modified facility (not just the modified portion of it) must generally be retrofitted to comply with the new performance standards unless this is not "feasible." The draft EIS never addresses the impacts that could foreseeably result from this provision. For instance, if more environmentally protective processes become available in the future, an operator might be hesitant to incorporate them into an existing facility for fear of having to retrofit the entire facility in all respects. Or, if an operator wants to expand operations, rather than modify (and thereby retrofit) an existing facility, it may decide instead to build an entirely new facility, thereby resulting in more environmental impacts than a modified but non-retrofitted facility. The draft EIS never assesses these or other potential environmental impacts reasonably likely to result from the modification provisions of the different alternatives.

Response: BLM did consider the impact of the proposed regulations on existing operations in EIS Appendix E. The impact was rated as a moderately negative to small open pit mines, and as a low negative to large open pit mines, in part because of the uncertainty this provision would create for some operators. But BLM does not believe this provision would result in increased environmental impacts. As part of the modification review process to determine whether unnecessary or undue degradation would occur, BLM would consider the environmental tradeoffs should the operator propose building a new facility versus expanding and retrofitting an existing facility. The provision in 3809.433(b), allowing for a demonstration that applying the final regulations to the entire facility is not practical should mitigate the impact on most operators while determining the environmentally preferred approach for mine expansion.

11.176 **Comment:** 3809.433(b) If the layback is on patented ground, does this apply? Which road widenings are covered? How much deviation on a day-to-day basis is the operator allowed to grade the grades, and is this considered to be road widening?

Response: The existing and final 3809 regulations do not apply to private lands and minerals, even if those lands are within the project area. Therefore, a modification would not be required for a pit layback totally on private lands. But if the layback on private lands causes some change in activity on BLM-managed lands, such as increased waste rock disposal or expanded leach pad areas, then a plan modification would be needed for those activities. For roads and grading, provisions for day-to-day maintenance needs should be written into the Plan of Operations and the overall specified road width should consider such activities. If the Plan of Operations calls for a road with a certain maximum width and you want to grade it to exceed that width, then you would be widening the road and would require a modification.

11.177 **Comment:** Proposed Section 3809.433 would cause the new performance standards to apply to a "new facility" within an operating area of a Plan approved before the effective date of these regulations. Similar requirements would apply to expansions of existing facilities unless BLM determines that it is not "feasible" for "environmental, safety, or technical reasons." Economic reasons would not prevent applying new performance standards to new or expanded facilities within an existing operation. Both of these requirements should be modified so that the proposed regulations would not apply to any activities within an "integral operating area" covered by an approved Plan or by a Plan submitted to BLM at least 18 months before the effective date of the regulations. An "integral operating area" could be defined as "an area containing the operations related to a single mine or mineral processing complex." Plans of Operations and the economics of established operations are based upon requirements and laws at the time those Plans and operations were developed.

Response: BLM understands that the economics of a specific operation were determined by the regulations in place at the time the project was first approved. That is why BLM believes it is appropriate for the regulations to apply only to new or expanded activities and that existing operations be "grandfathered.." But the expansion of existing operations has to transition to the new regulations. BLM believes that the provision in paragraph 3809.433(b) provides a reasonable transition approach allowing the operator and BLM to consider whether a certain measure can be applied in a feasible or practical manner that would not unduly constrain the operator. The provision has been revised to replace "feasible" with "practical" to account for the economic factors that must be considered. BLM does not believe it is needed to introduce the term "integral operating area" into the regulations. Project area and the description of activities covered by the Plan of Operations contain adequate definition.

11.178 **Comment:** Plans of Operations Section 3809.433 contains some of the 'if...then' standards in this proposed rule criticized above in our general comments on transition principles. The preamble asks (p. 6440, col.2) if [BLM] "would be creating too much confusion by setting up a situation where one set of regulations governs part of an operation and another set governs another part." Yes, it will generate confusion in inspection and enforcement and baffle anyone in the public accompanying an inspector. But the question bypasses one of the more serious points in our general comments above. It is not simply parts of "an operation" that may be under different standards, it is parts of the same, integrated "facility" - an individual milling unit, an individual pit, a leach pad, or a waste rock repository. The threshold we propose (i.e. the regulations in effect when a Plan of Operations is submitted must govern the plan and subsequent modification) avoids such confusion; the agency's does not.

Response: BLM does not believe that allowing operations to continue to expand or modify indefinitely under the old regulations to be a reasonable transition approach. Given the incremental nature of mining and the need to achieve economies of scale, it is not uncommon for Plan of Operations modifications to be larger in size and scope than the initial approved Plan of Operations. The regulations at 3809.433(b) provide a reasonable test of practicality in applying the new requirements to future modifications of existing mine facilities. BLM believes that as long as the overall facility design and operating parameters are clearly laid out in the approved Plan of Operations, the BLM inspector should be able to discern the appropriate requirements.

11.179 **Comment:** 3809.433 (a). Should a modification of part of an existing plan be the basis for revising the entire Plan to avoid confusion for BLM on what regulations govern what part of the Plan. The owner/operator has a myriad of permits, permit expiration dates, and permit terms and conditions for a mining operation. Accordingly, the test of whether it is better or worse to have different regulations for different phases of the mining operation should be left to the owner/operator. Training of BLM professional staff and good file documentation by the responsible BLM field office should eliminate any reasonable chance for confusion on what standards and requirements apply to which mining operations within the project area.

Response: The operator could propose that the modification be conducted under a single set of standards that meet the regulatory requirements. But as long as the overall facility design and operating parameters are clearly laid out in the approved Plan of Operations, the BLM inspector should be able to discern the appropriate requirements for each facility or part thereof.

11.180 **Comment:** Under a literal reading of the proposal, operators who wish to modify a facility to incorporate new environmentally protective technology could do so

only if they first retrofit the entire facility to comply with all of the proposed performance standards or established to BLM's satisfaction that retrofitting is not "feasible." In such circumstances, the operator would likely not install the new environmentally protective technology. For these reasons, the new rules should at most apply only to the modified portions of an existing facility, unless, of course, the operator can show that doing so is not appropriate for environmental, safety, technical, or any other reasons. It would not, for example, make sense to apply the new rules where they would not change the environmental impact of the facility as a whole or would be disproportionate to the scope of the requested change, e.g. lining a small addition to an existing unlined tailings impoundment–even if this were technically possible.

Response: BLM agrees with the comment and notes that the intent of 3809.433 is not to apply the new regulations to the entire mine facility, but only to the portion that is being modified and only if the application of the new regulations is practical. The final regulations have been revised to clarify that the requirement applies to the modified "portion of" the mine facility.

11.181 **Comment:** Under proposed 3809.433(b), an existing facility (such as a waste rock dump, leach pad, impoundment, or mine pit) that is modified after the effective date of the new 3809 program would be subject to the new performance standards unless the operator can demonstrate "to BLM's satisfaction [that] it is not feasible to apply [the new standards] for environmental, safety, or technical reasons." It appears that, under this provision, the entire "modified facility" (not merely the modified portion of the facility) must comply with the new standards. If so, the regulation imposes too great a burden on operators. An operator who has had its Plan approved by BLM under the existing rules and who has been operating accordingly, should not be required to shoulder the enormous burden of showing that it is not "feasible" to completely retrofit existing facilities for economic, safety, or environmental reasons. The term "feasible" can be interpreted to mean that it is not possible–absent bankrupting the company–to accomplish a given result. This in turn could mean that an operator could be required to expend enormous sums to retrofit an existing facility merely because it wanted to make a minor change to the facility. There is no acknowledgment in the preamble that BLM has even considered economics as one of the criteria for applying a new standard to modification of an existing facility. If, for instance, an operator wished to expand the size of an existing pit beyond that described in an approved plan, it could suddenly find itself subject to a backfilling presumption for the whole pit and a new requirement to "minimize" water quality and quantity impacts. A similar situation would exist if the operator wished to expand an existing tailings impoundment or add a lift to a waste rock pile. To avoid that result, an operator might build an entirely new waste rock pile or impoundment (rather than modify the existing one)–a result that would invariably entail more

surface disturbance.

Response: In most places where BLM used the term "feasible" in the proposed regulations it intended to include economics as a component of consideration. The term "feasible" has been modified by "technically" and "economically" as appropriate throughout the final regulations. Under 3809.433(b) "practical" has replaced "feasible" to acknowledge that economics (cost) is one of the factors that will be considered in deciding to exempt a modification of an existing mine from the performance standards. The backfilling presumption has been removed from the performance standards. Backfilling considerations do include mine economics as one of the factors in determining whether to require mine pit backfilling.

11.182 **Comment:** The regulations must be clarified regarding whether, when an amendment is filed, only the amendment is subject to the 3809 regulations or the amendment opens the entire Plan of Operations for the new 3809 regulations.

Response: The review and approval are for the amendment, or modification, being proposed, and do not open the entire Plan of Operations to reapproval under either the existing or new regulations. But while the modification is what would be review and approved, the scope of the NEPA analysis must consider the cumulative impacts of all the past actions.

11.183 **Comment:** We are concerned that decisions made and compromises wrought in the Plan approval process, regarding facility siting and operation, will simply be undone by a directive to modify the Plan after the operator has invested in opening the mine under the terms of the original approval.

Response: BLM notes that, while subject to modification as needed to prevent unnecessary or undue degradation under the existing regulations, existing approved facilities would not be required to change from the old performance standard to the new standards. The modification under 3809.433(b) applies only the new performance standards to that portion of the new facility being modified, and does not mean that the entire facility would be subject to new requirements.

11.184 **Comment:** Section 3809.433 would apply the performance standards of the new regulations to a new facility such as a new development rock repository or to the expansion of an existing facility such as a mine pit. WRC believes that new standards, particularly as stringent as in the proposed regulations, should not be applied to existing operations whether or not those existing operations are being conducted under the existing regulations. An example of the unworkability of a rule such as that proposed would be for an open pit mine working on private land but requiring a small area of BLM land for a slight expansion of the pit slope. Section 3809.420(c)(7) would allow BLM to require backfilling of the part of the

pit that expanded onto BLM land. This, of course, would require backfilling the entire pit, even on the private land part of the mine, even though only a minuscule area of BLM land may be involved.

Response: The backfilling situation described above, with a large amount of private land, is a good example of where BLM would allow for an exclusion from the new regulations as specified in 3809.433(b) on the basis of practicality. Other mine design and operation aspects would be reviewed in a similar fashion and a determination made on the practicality of applying the new regulations to the modification.

11.185 **Comment:** This incompatibility between new standards and existing facilities is clearly seen in the "If...Then" chart for modification of existing facilities (64 Fed.Reg. at 6462). The expanded plan content requirements and more stringent performance standards of the proposed rules would apply, according to proposed [section] 3809.433, to the "layback of a mine pit" at a previously approved operation. Thus, the presumption in favor of backfill in the new performance standards applies to permitting the new portion of an existing pit. How then does the proposed rule work? Will BLM agree not to apply that standard because it is not "technically feasible" to backfill the new portion of the pit, by itself? Or is it technically feasible because backfill of the new portion can be accomplished by backfilling some or all of the rest of the pit (i.e. the existing facility to which the rules are not supposed to apply under 3809.400)?

Response: The final regulations have removed the presumption for pit backfilling. Each situation would have to be examined on its own merits. In the example cited, since the 3809 regulations apply only to BLM-managed lands, backfilling the BLM lands would not be practical without concurrence from the regulatory agency responsible for the activity on private lands.

11.186 **Comment:** Plans of Operations Existing facilities with an approved Plan of Operations are not subject to the proposed 3809 regulations when finalized. In addition, any existing modification proposals should likewise not fall under these revised 3809 regulations, contrary to the proposed 3809.433. Otherwise, an operation would be subjected to different environmental performance standards, expanded public participation, differing financial guarantees and other related matters. This would lead to confusing regulatory requirements at the same site and to potential regulatory conflicts in requirements.

Response: The only areas where there might be different requirements are in performance standards. Even here the differences are not pronounced. Other aspects of the new regulations such as financial guarantees and enforcement apply to both existing and new operations.

11.187 **Comment:** It could be difficult if not impossible from a technical and economic perspective to retrofit existing designs for future additions to existing facilities and systems to meet the proposed performance standards. For example, if there are modifications to an existing leaching system (i.e. more leach pad construction), it may be impossible or cost prohibitive to reconfigure a surface drainage system for an entire leaching system to achieve the proposed 100-year, 24-hour design requirement for solution containment.

Response: Because BLM recognizes the potential for this difficulty, the revised regulations at 3809.433(b) allow for waiving this requirement if you demonstrate that it is not practical.

11.188 **Comment:** Presumably, an option may not be feasible for cost reasons. But such relief is not authorized under the transition provisions, even where environmental impacts would be minimal. BLM will face a substantial practical problem if it attempts to implement to different standards for different components of the same facility. Rather than create such administrative difficulties, BLM should revise the proposed rule so that the new requirements apply only to new facilities that have not yet submitted Plans of Operations for review.

Response: Economics (cost) has been included in 3809.433(b) as one of the factors used to determine the extent to which modifications to existing facilities are exempt from the performance standards of the new regulations. BLM has also revised the final regulations to not apply the performance standards or plan content requirements to Plans of Operations that where submitted to BLM before the effective date of the final regulations.

11.189 **Comment:** The proposed rules should not apply to existing or pending Plans of Operations or to modifications to such Plans. The mining companies object to any retroactive application of the proposed rules. If it proceeds to finalize the proposed rulemaking despite the extensive opposition, BLM must clearly specify that where an operator has filed a Plan of Operations before the effective date of the regulations, the operation and plan are subject to the existing subpart 3809 rules. This is particularly important where BLM already has pending Plans of Operations on file for approval. BLM's delay in processing such plans or accompanying NEPA documentation should not penalize operators.

Response: BLM has changed the proposed rule to read as you suggested. If the modification was filed before the effective date of the final rule, the new Plan content requirements and performance standards do not apply. See revised section 3809.434.

11.190 **Comment:** Apart from our objections to the presumed backfill performance standard on its merits, this example shows how this transition provision is both unworkable and bad public policy. Where, at minimum, is economics as a

consideration? If the Plan modification (whether for a new or modified facility) is essential to maintenance of the operation, it is neither good public policy in the rural western economy nor good mineral resource conservation to deny a mine-sustaining Plan modification because it cannot meet a performance standard promulgated after the mining operation began. Our criticism of this aspect of the transition rules is consistent with our criticism of fixed performance standards generally–what is unnecessary or undue in one location may be necessary and due at another mine under different circumstances. The statute allows this; the proposed rules, it appears, do not. But in the transition Plan modification context the problem is magnified by BLM's unworkable proposal to have different standards apply to integrally related portions of the same "facility" such as a pit, leach pad, or mill complex.

Response: BLM agrees that what is unnecessary or undue at one location may be due and necessary at another. BLM disagrees that the performance standards are "fixed" and somehow do not allow for the consideration of site specifics. If anything, the performance standards overly rely on subsequent project-level, site-specific analysis, to give them substance. Regarding transition for modifications to existing operations, economics are considered in the final regulations at 3809.433(b), which allows for a demonstration that application of the new performance standards would not be "practical."

3809.434 Pending Modification for New or Existing Mine Facility

11.191 **Comment:** In 1996, before BLM proposed any changes to 3809, Cortez Gold Mines submitted a Plan of Operations to BLM to amend its pipeline operations to incorporate some new facilities for its south pipeline project. BLM proposed rule amendments on November 26, 1996. Now, after more than 2 years and 4 months and significant expense on the part of both BLM and Cortez in preparing an EIS, Cortez alone has spent more than $2.7 million on contracts for EIS preparation. We have no assurance that a draft EIS will be released to the public before the effective date of the proposed rules. According to the proposed rules, should this occur, and the draft not be released to the public before the effective date, the south pipeline Plan of Operations would have to be revised, performed with the new rules. And the new performance standards under the rules would be imposed on this project. There is no criteria given within the proposed ruling as to why this would be required. Revising the south pipeline Plan of Operations to conform to the expanded plan of requirements and modifying the plan and the draft EIS to incorporate the new performance standards would significantly delay the project approval and cause a significant added expense to Cortez, assuming the project remains economically feasible. We believe that it is unreasonable to put at risk projects well into the permitting process in both time and dollars by applying these proposed rules retroactively and request that the proposed rules not be applied to

pending Plans of Operations for which an EIS is being prepared.

Response: In the final regulations, BLM has deleted the requirement that the performance standards and Plan content requirements be applied. As long as a substantially complete Plan of Operations is submitted by the effective date of the final regulations, the old plan content and performance standards will apply to its review. All other provisions of the final regulations would apply.

11.192 **Comment:** The proposed rule should delete the unfair NEPA document publication requirement trigger to grandfather proposed Plans of Operations and modifications submitted but not final at the time the proposed rules become final (proposed Section 3809..434, .435.)

Response: The requirement as been deleted as suggested.

11.193 **Comment:** BLM is making these three subsections too complicated, burdensome, and cumbersome. If the new facility or modification can be completed under an EA/FONSI, then the standards in effect at the time of Plan approval should apply. If the modification or new facility requires an amendment to the EIS prepared for the original decision by BLM, then the supplemental EIS should determine the extent, if any, to which the new regulations apply. For example, if a modification would result in fewer air emissions, why should the owner/operator be required to submit an entirely new Plan of Operations. Nor would having to submit a new Plan of Operations be consistent with the NRC study findings and recommendations, especially Recommendations 4, 11, 14, 15, and 16. Revise .433 to apply the concept that when a new or modified facility causes the preparation of an EIS or a supplement to an existing EIS, the reasons for the EIS determine the extent, if any, new standards are appropriate. Conversely, if the proposed action can get BLM approval with an EA/FONSI, the regulations of the existing BLM authorization would continue in full force and effect.

Response: BLM considered having a NEPA criterion such as EA/supplemental EIS for when to apply the new regulations to a modification, but we did not adopt it because of potential problems with consistency. Instead, BLM has simplified these sections. Section 3809.435 has been combined with section 3809.434. The cutoff for applying the rule to pending modifications has been relaxed from the NEPA document publication date to the effective date of the final regulations. If your modification was filed before the effective date of the new rules, it remains under the old Plan content and performance standard requirements. Practicality has also been added as a criterion to 3809.433(b) for determining the applying of the new regulations to existing facility modifications. These changes would improve the workability of the regulations. Nowhere do the regulations require an entirely new Plan of Operations for a modification and certainly not for one that decreases impacts. The final regulations are not inconsistent with NRC recommendations

on improvement in the modification process to quickly address environmental concerns.

11.194 **Comment:** Proposed Section 3809.434 defines the applicability of the new performance standards to a pending modification of a Plan of Operations to build a new facility such as a road within an area covered by a Plan of Operations approved before the effective date of the proposed regulations. The new performance standards would apply if BLM had not made an EA or draft EIS for the modification available to the public before the effective date of these regulations. This creates the same unfairness described above for new or modified facilities within an operations area and should be dealt with similarly. It would create too much confusion by setting up a situation where one set of regulations governs a part of an operation and another set governs another part. The design of a new facility at an existing operation and the decision to build and operate it are based on existing, not future, performance standards. It is even more inappropriate to apply new standards to such facilities than it is to apply them to a wholly new Plan of Operations submitted before adoption of new standards. It is appropriate for an operator to use the proceeds from the initial phases of its operation to continue the exploration and delineation of additional reserves. Ultimately such revisions, continuations, and possible expansions of the original operation are tied to the terms and conditions of the initial approval. A new facility at an existing mine is proposed because it fits economically, logistically, and operationally into an existing operation. The new facility can be designed and located only in ways dependent on the design and operation of the existing mine. The facility should not be prohibited by standards that would not have allowed the initial facilities to be located where they are or operated as they are. The same standards that governed approval of the initial facility location and mode of operations must govern the new facility.

Response: BLM understands the concern that modifications may not be able to occur if held to a higher standard than the initial Plan of Operations. But BLM believes that the new performance standards in 3809.420 will generally be compatible with existing operations when applied on a site-specific basis. Modifications under the existing regulations happen often, yet evolving changes in regulatory approaches and thinking get incorporated successfully, even when it may be years between the initial facility approval and the modification. It would not be that different with a change in regulations. As long as the approved Plan of Operations clearly stated how the overall facility was to be built, operated, and reclaimed, there should be no more confusion over expected performance than occurs today with modifications processed under the existing regulations. Nor does BLM expect facilities be prohibited from expansion because of the changes in performance standards in 3809.420.

11.195 **Comment:** Revise .434 to use the same concept recommended for .433 with an added provision that the project will continue under the now existing 3809

regulations if the public scoping process has been completed and the owner/operator has already made financial commitments that may be needed to resolve issues that came out of the completed scoping process.

Response: Section 3809.434 has been revised to allow a project modification submitted before the effective date of the regulations to continue under the existing 3809 regulations. This would predate even the scoping process suggested by your comment and should satisfy this concern.

11.196 **Comment:** 3809.435 contains the least appropriate of the three transition provisions. Applying new standards to approval of the modification of an existing facility is the most confusing, the least appropriate, and the most likely to render the continued operation uneconomic, of the three transition situations addressed in the proposed rules and these comments. Revise .435 to use the same concept recommended for .433 with an added provision that the project will continue under the now existing 3809 regulations if the public scoping process has been completed and the owner/operator has already made financial commitments that may be needed to resolve issues that came out of the completed scoping process.

Response: 3809.435 has been combined with 3809.434 and revised. Modifications pending on the effective date of the final rules would be exempt from the performance standards and Plan content requirements. This would predate even the scoping process suggested by your comment and should satisfy this concern.

11.197 **Comment:** There are many conflicting statements. On page 214, Affected Environment and Environmental Consequences, Alternative 3: Proposed Action, BLM states that existing operations would be "grandfathered" and would continue to operate under existing regulations. BLM goes on to state that the proposed regulations under the Proposed Action would apply only to future plans to expand existing operations and that "most" current operations would be unaffected. This is a very large weasel and not a true statement. Notice-level operations are not intended to be grandfathered. We read at 3809,1-2 "Notice: Disturbance of 5 acres or less" would expire 2 years after the effective date of the final rule, at which time the operator would be required to extend the existing notice under proposed 3809.333. And under proposed 3809.503, the operator would be required to provide a financial guarantee. Under current 3809 regulations, there is no expiration of a Notice, nor is there a requirement for financial guarantee for operations conducted under a Notice. This attempt to mislead and confuse the public, in my opinion, causes the document to fail to meet the requirements of NEPA, EPA, executive orders and, other laws and regulations.

Response: The section to which you refer concerned the economic impact on existing mining operations and was referring in general to performance standards for existing Plans

of Operations. The grandfathering provision for Notices greatly differs from that for Plans of Operations. The economic analysis in the final EIS has been revised to reflect the different grandfather provisions for Notices. For details on the grandfathering provisions, see the alternatives discussion in Chapter 2.

MINING CLAIM VALIDITY

12.01 **Comment:** When BLM conducts an examination in a withdrawal or segregated area to assess valid existing rights, it does not impose time periods on itself in making recommendations on the validity of the claims.

Response: BLM will make a diligent effort to schedule valid existing rights examinations as soon as possible. It will be very helpful for mining claimants to have their prewithdrawal or presegregation discovery data ready for the BLM examiner to expedite the examination process.

12.02 **Comment:** If BLM cannot complete a valid existing rights determination in a withdrawal or segregated area within 30 business days, the Plan of Operations is automatically approved.

Response: There is no automatic approval in any version of the 3809 regulations for failure of BLM to approve a Plan of Operations, or complete the valid existing rights examination within 30 business days.

12.03 **Comment:** The commenter is concerned that BLM is intending to unlawfully apply a comparative disturbance test to determine the validity of mining claims – similar to the comparative value test that has recently been in dispute in the United Mining Case.

Response: No provisions in the proposed 3809 regulations would apply a "comparative disturbance test"

12.04 **Comment:** Concerning valid existing rights examinations, how can anyone but the miner decide if a deposit is economically feasible to work?

Response: BLM mineral examiners are geologists and mining engineers trained in sampling, interpreting, and evaluating mineral deposits to determine whether, in their professional opinion, a discovery of a valuable mineral has been made. If that assessment determines the claim(s) to be valid, the Plan of Operations will be approved if all other requirements of the 3809 regulations are met. If the examination does not identify a discovery, then a contest would be initiated alleging that no discovery has been made. The mining claimant can then answer this complaint. The mining claimant and BLM will appear before an administrative law judge, who will decide for the mining claimant or BLM. The mining claimant may then appeal contest actions to the Interior Board of Land Appeals and then to the District Court, the Court of Appeals and ultimately the Supreme Court. A valuable mineral deposit has been discovered where minerals have been found in such quantity and quality as to justify a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable miner. *Chrisman* v. *Miller*, 197 U.S. 313 (1905). This so-called "prudent man"

test has been augmented by the "marketability test," which requires a showing that the mineral may be extracted, removed, and marketed at a profit. *United States* v. *Coleman*, 390 U.S. 599 (1968). In addition, where land is closed to location and entry under the mining laws, after the location of a mining claim, the claimant must establish the discovery of a valuable mineral deposit at the time of the withdrawal, as well as the date of the hearing. *Cameron* v. *United States*, 252 U.S. 450 (1920); *Clear Gravel Enterprises* v. *Keil*, 505 F.2d 180 (9th Cir. 1974).

12.05 **Comment:** Why is it necessary to put the VER for withdrawal or segregation in this regulation? Both the Forest Service and BLM already require VER examinations when lands have been withdrawn or segregated.

Response: Yes, BLM does have this authority, but we have not always applied it consistently. Furthermore, because we want this regulation to be in plain language we feel it is important for mining claimants to be apprized and to be aware of the requirements for lands that have been withdrawn or segregated. For the purpose of determining VER, there is no difference between withdrawn lands and segregated lands.

12.06 **Comment:** Suggest that validity determinations should be required on all lands; withdrawn or segregated or not, before plans are approved.

Response: We are responsible for reviewing closely, data submitted in a plan of operation to ensure that plans for extraction of the mineral deposit makes sense. By way of example, we would not approve a Plan of Operation for an open pit gold mine, if there were no data submitted outlining where the gold mineralization lies. Similarly, it would not make sense for a mining claimant to spend millions of dollars in the construction of the mine, if there was nothing to mine. However, if there is ever a plan of operations that may look marginal on paper, the BLM manager has the prerogative and the responsibility to request a validity exam before that plan is approved. Generally speaking, however, BLM will not require validity examinations when Plans of Operations are submitted on lands open to location under the mining laws.

12.07 **Comment:** Miners cannot afford the cost of validity examinations.

Response: When BLM initiate VER determinations on lands that have been withdrawn or segregated, BLM absorbs the cost of this examination under current rules. But the mining claimant will have some associated costs, especially if the mining claimant must defend his/her asserted discovery in court.

12.08 **Comment:** Segregation is not enough to trigger disapproval of a Plan of Operations. Lands should be available until the formal Federal Land Policy and Management Act withdrawal process has been followed.

Response: The segregation does not automatically trigger a disapproval. The BLM manager has discretion to approve Plans of Operations on land under the "segregated" category. That decision will be made on the basis of the magnitude of disturbance under the proposed activities, measured against the purpose of the segregation.

12.09 **Comment:** The Secretary of the Interior does not have the right to deny access and locations for lands that are merely segregated.

Response: Segregated lands are close to the operation of the Mining Law, if so stated in the segregation notice. From this standpoint there is no difference between "segregated" lands and "withdrawn" lands. Both are closed to the operation of the Mining Law. No mining claim can be located and no discovery under the Mining Law can be asserted after the effective date of the withdrawal or segregation. If valid claims exist in segregated areas, access to such claims would be provided, consistent with the Mining Law.

12.10 **Comment:** It appears that a valid existing rights determination on lands withdrawn or segregated is discretionary. It should be mandatory.

Response: A valid existing rights determination is mandatory for withdrawn lands, but for lands segregated, the BLM authorized officer has discretion to approve a Plan of Operations as long as the proposal is not inconsistent with the purposes of the segregation.

12.11 **Comment:** Operations in national monuments are regulated under the provisions of the Mining in the Parks Act and already require approval by the National Park Service.

Response: At this writing BLM has seven national monuments under its administration. These monuments are not a part of the National Park Service system and, therefore, the Mining in the Parks Act does not apply to them.

12.12 **Comment:** When an applicant proposes uses on lands that do not contain valid claims, BLM may not approve a use of the public land where such use is adverse to the public interest or where such use would effectively result in the exclusive use of that land by the holder of the permit.

Response: Sec 302(b) of FLMPA reiterates the long-held statutory provision of the Mining Law and associated case law that the United States must provide for ingress and egress to the public lands for the mineral exploration and development regardless of whether there is a mining claim or millsite. Any authorization of access under 3809 does not mean exclusive use for the operation until that access is within the project area. That is, BLM will approve an exploration activity on a mining claim even when it is not valid; i.e., there is not yet a discovery of a valuable mineral. The purpose of the discovery, is of course, to make that discovery. If the lands are withdrawn, however, it is too late to

make a discovery and the activity would be denied. On lands open under the Mining Law, satisfaction of the Subpart 3809 requirements provides a basis for approving mining activities on unclaimed lands. Claimant desire for exclusive use for access on unpatented mining claims would be considered under Title V of the FLMPA, and the rights-of-way regulations at 43 CFR 2700. Market value rental is paid for rights-of-ways under this authorization.

Common Variety Determinations

12.13 **Comment:** When BLM examines a mining claim to determine its locatability of what may be a common variety, it not only has to check for its "special and unique" characteristics but it must also ensure that the mineral deposit is of sufficient quantity and quality to satisfy the Prudent Man Test.

Response: We must ensure that the mineral deposit of is locatable under the Mining Law rather than salable under the Material Act of 1947. In accordance with Public Law 167 (the Surface Resources Act of 1955), only uncommon materials of sand, stone, gravel, pumice, pumicite, or cinders are locatable. Please see 43 CFR 3711.1 for a more detailed explanation of the common variety requirements. Court cases have further refined this test, especially in *McClarty* v. *Secretary of the Interior*, 408 F2d 907, (9th Cir 1969). Once BLM has determined that a deposit consists of a locatable mineral, it determines on a case by case basis whether a discovery exists.

12.14 **Comment:** The limited activities permitted in 3809.100(b) may not be sufficient to support a proper mineral report reaching a conclusion whether the deposit is one of an uncommon variety.

Response: Samples will be taken and tests conducted to ensure that the mineral is special and unique. Tests may also be done for comparative purposes on other similar mineral deposits that may also be used for the same product. These tests and the legal requirements established through case law will be documented in the mineral examination report.

12.15 **Comment:** The draft EIS states that the "present policy is to process the 3809 action and collect potential royalties in escrow while a determination is made on the locatable versus salable nature of the material." There is no requirement for this.

Response: BLM's present policy is to encourage an escrow account when the common versus uncommon nature of the mineral was in question. But if the operator did not cooperate, the existing 3809 regulations do not expressly address whether BLM may delay approval of a Plan of Operations while an examination was under way. The proposed final 3809 regulations would allow BLM to delay approval until escrow is agreed to, or an examination is made and the nature of the material resolved.

12.16 **Comment:** The proposed rule should delete the entire section dealing with special provisions for common variety minerals.

Response: It is not in the public interest to delete this requirement. We must ensure that the mineral deposit of nonmetallic minerals is locatable under the 1872 Mining Law rather than salable under the Material Act of 1947. In accordance with Public Law 167 (the Surface Resources Act of 1955), only uncommon materials of sand, stone, gravel, pumice, pumicite, or cinders are locatable. As stated in an earlier comment and answer, the principal test for that determination is *McClarty* v. *Secretary of the Interior*. If the material is asserted to be an exceptional clay, BLM will refer to, among others, the *U.S.* v. *Peck*, 29 IBLA 357, 84 ID 137 (1977).

12.17 **Comment:** The way I read this is that BLM would invoke the common mineral criteria in the present mining laws to include an operator who chooses to mine road building material for his operation or if he needs reclamation material on his or her mining claims to fulfill the unnecessary or undue degradation standards. Please explain in detail why this would or would not be the case.

Response: If use of common variety mineral material is incidental to an operation conducted under the Mining Law, then the operator may generally use that material at no charge. The material has to come from mining claims which are part of the locatable mining activity, and not from claims outside the project area. Removal of common variety material for construction and reclamation purposes on project claims must be included in the Plan of Operations that is approved by BLM.

12.18 **Comment:** BLM would have authority to sell common material from an unpatented mining claim as the Forest Service is doing now. Such sales could result in placing gold-bearing gravels on roads, thus wasting a resource.

Response: A BLM contractor or permittee would remove common material from an unpatented mining claim only after review to ensure that removal would not interfere with the mining claimant's operation, and only with the concurrence of the mining claimant.

12.19 **Comment:** What is a mineral report, how is it initiated, what are the qualifications for doing a mineral examination and associated report, and who reviews the report?

Response: There are formal procedures and strict guidelines for the mineral examination and the required certification by BLM of mineral examiners and reviewers. These are found in BLM Manual 3895 and the *Handbook for Mineral Examiners* (Haskins and others 1989) and can be reviewed in your local BLM office.

12.20 **Comment:** The discussion of common variety minerals is confusing since common variety minerals are not locatable under the 3809 regulations.

Response: Although common variety minerals are not locatable, some mining claimants still attempt to remove common varieties under the Mining Law and associated 3809 regulations. The revised rules attempt to address this practice. BLM sells common variety minerals under contract and receives market value upon sale.

12.21 **Comment:** BLM should be liable for any economic losses resulting from the extraction of minerals believed to be common variety but are later found to be locatable.

Response: There should be no economic loss if the mining claimant ultimately prevails. Any money placed in escrow would be returned to claimant together with any interest that accrues.

12.22 **Comment:** The right to "occupy" public land in the pursuit and development of mineral deposits exists apart from the claim location and patenting provisions of the Mining Law and would negate any attempt by BLM to issue a regulation that limited operations under the 3809 regulations to validated claims.

Response: We agree. The 3809 regulations cover operations before and after mining claims are located. If an operator files a Plan of Operations on lands withdrawn or segregated but not yet encumbered with a mining claim, BLM must reject that Plan of Operations, because it is too late to make a discovery on these lands and too late to locate a mining claim on lands already appropriated by the United States for other purposes.

STATE LAW CONFLICTS

This section addresses situations where state and federal laws or regulations for the conduct of mining operations may conflict. The proposed final rules have been revised to clarify the situations if state laws conflict with this subpart, to include the position of BLM on preemption with regard to *California Coastal Commission et al.* v. *Granite Rock Co.*, 480 U.S. 572,581 (1987), and to incorporate the 1980 final rule preamble position on preemption into the regulations. These clarifications and explanations were necessary because many exploration and mining operations in the western United States occur on both public and private lands.

13.01 **Comment:** BLM received many general comments on state conflicts and preemption. Many commenters expressed concern that this section would create confusion and "cause a lot of problems for BLM," especially at sites with mixed public and private lands. Other commenters expressed concern that the effect of this section will be to diminish the state roles as co-regulators on federal lands within their borders. One commenter believed that preemption of state laws was one of the most fundamental problems in the draft rules. Another stated that, "This one-sided approach to the preemption issue would abdicate Congress's direction to BLM to encourage development of federal resources." Most state agencies expressed concern that this section would harm existing federal-state relationships. Commenters noted that this provision and the provisions in federal and state agreements would effectively cause the states to change their programs.

13.02 **Comment:** One commenter stated that the "proposed rule does not address one of the most fundamental problems raised in comments on BLM's draft rules, the preemption of state laws." Another commenter added that "This provision coupled with the proposed provisions of the federal/state relationship (Sec 3809.201-204) and the proposed performance standards (Section 3809.204) will have a preemptive effect on state laws. Preemption of state laws is not contemplated by FLPMA and will cause a host of problems." Commenters from the state agencies requested that BLM state in the regulations and the draft EIS where there is conflict with specific state laws. Commenters also disagreed that the new provision is consistent with Granite Rock. One commenter said that any state provision "that is so stringent that it effectively precludes mining or substantially interferes with mining on the public lands is preempted, because it would run afoul of the provisions of the Mining Law."

13.03 **Comment:** One commenter specifically asked, "Will BLM therefore, enforce the newly enacted Montana constitutional amendment banning cyanide leach processes from new mining operations?" The commenter noted that it far exceeds the BLM standards and the Alternative 4 in the draft EIS.

13.04 **Comment:** Commenters noted generally that the proposed rules' provisions on preemption and conflict cannot be reconciled with the NRC's recommendations and that the existing regulatory relationships work and need not be replaced by the BLM

regulations. One commenter noted that the requirements of this section "would take over administration of the programs previously handled by the states" and is inconsistent with the recommendations of the NAS."

13.05 **Comment:** Most of the comments on this provision were concerned about the revisions from the previous rule and the negative impacts on federal and state relationships. Although no specific comments expressly and specifically supported the proposal, general comments expressed concern that state laws are not strict enough to protect public lands and BLM should not abdicate its stewardship responsibilities by deferring programs to the states.

13.06 **Comment:** Most of the commenters that expressed concern over the proposed regulations urged that BLM not change the existing regulations.

Response: BLM recognizes that states may apply their laws to operations on public lands but does not expect conflicts to be common. A conflict occurs when it is impossible to comply with both federal and state law at the same time, or where state law is an obstacle to the objectives of Congress. If a conflict were to occur, the operator would have to follow the requirements of this subpart on public lands. In this case, the state law or regulations would be preempted only to the extent that they specifically conflict with federal law. If there is no agreement of any type and there is no conflict with federal and state laws and regulations, then both federal and state laws and regulations would apply to the same operation on the public lands, and effort would be duplicated. BLM is concerned by the part of the proposed regulations have been misunderstood and does not intend to change these regulations' basic purposes, which include to provide for coordination with state agencies and to avoid duplication.

These regulations do not preempt state laws and requirements except where there is direct interference and conflict with FLPMA regulations and the inherent responsibilities of the Secretary of the Interior to properly manage public lands. In other parts of these regulations, BLM states that preventing unnecessary or undue degradation also means compliance with state environmental protection laws. Also for some state laws, such as for ground water quality, BLM has no direct authority, and cooperation with such state requirements helps BLM ensure against that unnecessary or undue degradation. State laws and regulations are used in these regulations to complement and supplement BLM's program to prevent unnecessary or undue degradation.

BLM does not expect that such conflicts will routinely occur, and where they may occur, BLM and the state could cooperate using the agreements under 43 CFR 3809.200 through 204 to programmatically resolve such issues, consistent with the requirements of the subpart. A state could therefore strengthen a regulation to be consistent or functionally equivalent to this subpart.

BLM believes that the regulations are consistent with FLPMA, the Mining Law of 1872, and the *Granite Rock* principles. Most of there regulations should not conflict with state laws or regulations. One possible case where the regulations may conflict with state requirements is 3809.415 (d), which requires avoiding substantial irreparable and unmitigatable harm to significant cultural and environmental resources. Such a conflict is expected to be rare as historically most resource conflicts have been mitigated on the public lands. This requirement could address an issue related to the Secretary's trust responsibility on impacts to adjoining or nearby Native American lands. Some states may not have such requirements. In this specific case, there may be rare situations where the 3809 regulations prevail and state law would allow such "harming" action or remain silent on such an action.

In certain situations state law or regulations may represent higher standards of protection than federal regulations. In such situations BLM will coordinate to the greatest extent possible with the state, and the state law or regulation will operate on public lands. BLM believes that such action is consistent with FLPMA, the Mining law of 1872, and the Granite Rock case.

This provision is not inconsistent with the NRC study (NRC 1999) because the study recognized (page 90) that the overall regulatory structure "reflects the unique and overlapping federal and state responsibilities," and also addressed (page 68) the mechanism for protecting valuable resources and sensitive areas. BLM believes NCR's recognition represents an acknowledgment of the Department of the Interior's responsibilities in regard to FLPMA for which the states may not have analogous coverage.

FINANCIAL GUARANTEE (BONDING) REQUIREMENTS

Adequate Bonding

14.01 **Comment:** Adequate bonding is needed to protect the public from bearing the financial burdens of cleanup should an operator declare bankruptcy and abandon a mine site.

Response: The proposed final regulations require operators to post a financial guarantee for all activities other than casual use. Financial guarantees must cover estimated reclamation costs.

14.02 **Comment:** Neither state nor federal regulations currently include adequate bonding provisions. This has resulted in the taxpayer assuming the costs of cleanup of inadequately reclaimed and abandoned mining operations. 3809 revision should include provisions that hold the mining operator completely financially responsible for the real cost of cleanup. In particular, bonding should protect the public from the possibility of the mining company's insolvency. Self-bonding should be disallowed, and public participation should play a role in the determining bonding levels.

Response: The proposed final regulations allow for an increased public role in determining when BLM should release a financial guarantee. In the proposed final regulations we included regulatory language that clearly describes the responsibility of operators at every stage of mining and postmining.

14.03 **Comment:** Colorado is one of many states with massive cleanup of this toxic land resulting from mining years ago. We taxpayers resent having to pay for this necessary step when personal profit was gained from these original operations. We must face what needs to be done and do what is correct, not what is easy.

Response: The proposed final regulations require operators to post a financial guarantee for all activities other than casual use.

14.04 **Comment:** The financial crunch especially is in the bonding issue there. If I do have a prospect, I'm retired, and I don't know how I'm going to be able to come up with a pretty good-sized bond to even go in and try to develop this land. It's not fair. What I would propose is that there would be a window in there that a person could go in and develop an area and at least see what he has before he would have to put up a bond.

Response: The NRC report (NRC 1999) recommended that operators post a financial guarantee for all activities beyond casual use. The proposed final regulations must include such a provision or they would be inconsistent with the NRC (1999) report.

14.05 **Comment:** When you look at the impact of this economically as a whole, it's possible

that the posting of bond will increase the cost of operating in the United States and in Arizona and elsewhere. Those are the costs of doing projects. But at the same time, they're also the costs of the public health and welfare. And you have to consider the citizens of this nation.

Response: The NRC report recommended that operators post a financial guarantee for all activities beyond casual use. The Proposed final regulations must include such a provision or they would be inconsistent with the report.

14.06 **Comment:** To avoid companies declaring bankruptcy and/or dissolving, to avoid foreign parent entities escaping liability by dissolving U.S.-based subsidiaries, require parent entities to make good on their subsidiaries' financial obligations and to be able to be sued under U.S. law so that the U.S. Government and other claimants may have their day in court over serious issues (e.g. collecting on a $100 million cleanup bill).

Response: The proposed final regulations establish liability and makes clear that if a financial guarantee is insufficient to cover the cost of reclamation, the operator remains liable for damages. The definition of the term "operator" addressed the degree to which parent entities are responsible.

14.07 **Comment:** BLM, arguing for continued enforcement, warns of potential publicly funded restoration efforts and cites a 10-year-old report showing estimated restoration cost. The Court, however, is unconvinced by such anecdotal evidence. In fact, the Court does not find that much would change should enforcement be discontinued. Large, open-pit mines are already subject to discretionary local requirements by BLM as Plan-level operations. Moreover, BLM admits that it already has in place a policy that requires 100% bonding for all mining operations that use cyanide or other dangerous leachates. In other words, to protect the environment against the most potentially dangerous mining operations, BLM need only exercise its existing powers between a remand and its next final rule promulgation.

Response: The proposed final regulations provide a greater level of protection then the previous rules in many ways. For instance, it includes stronger enforcement provisions, as suggested by NRC (1999), establishes a clearer framework for administering a financial guarantee program, and provides for long-term trust funds to assure that postmining activities will continue, as well as requiring the notice level operations be bonded. The quoted material, addressing whether previous remanded bonding rules should continue in effect pending the promulgation of new financial assurance rules, is not relevant to the basis and purpose of the new rules.

14.08 **Comment:** To be effective, the proposed rule must clarify and further define how financial assurances address and cover the risks in the following areas:
-Hardrock mining in mountainous terrain and associated precipitation events that lead to

releases of metal leaching/acid rock drainage.
-The need to address ground water pathways.
-Closure requirements to meet Clean Water Act requirements.
-Types and timing of financial assurances accepted.
-Consideration of pool-funding in the form of sureties or insurance for mining companies with less than an investment-grade financial rating.
-Self-insurance acceptance criteria.
-The extent of coverage and distribution specifics of the financial instrument.
-Stages and total release criteria.
-Correctional and postclosure requirements to meet FLPMA requirements.
-Period review and adjustment for inflation escalation.
-Possible retroactivity and grandfathering.

Response: The proposed final regulations address these items as necessary. Financial Assurances are tied to the estimated cost of the approved reclamation plans. Under a Plan of Operations the reclamation plans must address these items before BLM can approve a Plan. BLM does not address grandfathering, as a Plan submittal requirement, but it is addressed in the proposed final regulations.

14.09 **Comment:** The Department of the Interior (DOI) has not provided any meaningful data showing how the proposed modifications to the existing 3809 bonding requirements would be improved, or unnecessary or undue degradation prevented. These changes place on small miners a significant financial burden that is not properly evaluated in the draft EIS or DOI, December 21, 1998 analysis.

Response: The NRC report recommended that BLM change its bonding requirements to include Notice-level operations. The proposed final regulations are consistent with this recommendation. A BLM field survey demonstrated that many small operations caused problems which bonding can address. NRC believes, and BLM agrees, it is likely that posting a financial guarantee prevents unnecessary or undue degradation. In any event, the taxpayer should not be left having to fund the reclamation of mining.

14.10 **Comment:** The proposed regulations, EIS and 12/22/98 Department of the Interior "analyses" should be revised to include an "Encourage Mineral Development/ Streamlining Alternative" that balances the Maximum Protection Alternative reflected in the proposed regulations. This Encourage Mineral Development/Streamlining Alternative should, as a minimum, include an evaluation of the following factors: maintaining the existing cost structure and data requirements that are a FLPMA responsibility of BLM rather than shifting the cost to the owner/operator.

Response: The recommendation in this comment is similar to the No Action Alternative, which is inconsistent with the NRC report. Moreover, nothing in the proposed final regulations changes cost structure or data requirements. What may appear as additional

data requirements are, in practice, are no different from what operators have been providing under the existing regulations.

14.11 **Comment:** All documents and especially the proposed regulations are deficient and legally flawed in ignoring that a BLM-approved Notice/Plan/reclamation submission and associated financial guarantees by the owner/operator is a contract between the owner/operator and BLM. Accordingly, the supporting documents and regulations fail to describe and evaluate BLM's responsibility and risk when the owner/operator has fully complied with the BLM regulatory and permit conditions. Since the owner/operator has fully complied with the contract and BLM has so certified by decision and release of the financial guarantee for that project element, BLM is entirely responsible for any later event on the reclaimed area.

Response: We disagree with the comment. The operator's responsibilities are imposed by statue and regulation, and are more than just contractual. The owner/operator is liable for any degradation that results from mining, regardless of whether BLM has released the financial guarantee. In the commenter's words, that is part of the contract between the operator and BLM.

14.12 **Comment:** 3809.503 fails to explain what will be done if an area to be disturbed has already been disturbed previously (common in exploration where drill roads are reclaimed regularly, and projects are reexamined and re-explored in later years). This section should be clarified to state that the operator is responsible only for the disturbances created by that operation.

Response: Operators are responsible for the areas of disturbance where they conduct their activities. This could include redisturbance that occurs over existing disturbances. The limits of these reclamation responsibilities should be established when a Plan is approved, or a Notice filed, or else they may be held responsible for all necessary reclamation.

14.13 **Comment:** Consider increasing the bond on a per acre ratio. The proposed regulations are too complex, creates too much paperwork, and leaves open disputes as to the arrival of the actual costs of reclamation.

Response: The proposed final regulations require operators to post a financial guarantee to assure that reclamation takes place. The proposed final regulations do not prevent BLM field managers from implementing a financial guarantee program on a per-acre basis as long as the operator posts a financial guarantee acceptable to BLM.

14.14 **Comment:** Rather than attempting to have something like a cash bond or actual cash on deposit for an indefinite time–perhaps tens of years–it would be more appropriate for BLM and the Forest Service to have funding authority to expend federal dollars for the

very few, if any unforseen "emergencies" causing unnecessary or undue degradation.

Response: BLM believes that the operator responsible for creating the surface disturbance should be responsible for the reclamation and for any unforseen emergency costs associated with preventing unnecessary or undue degradation. The taxpayer should not have to pay to repair degradation of the public lands caused by an operator.

14.15 **Comment:** Clarify that the state may require more financial assurance for specific water quality requirements not included in the proposed 3809 regulations.

Response: The proposed final regulations are clear that states may impose requirements beyond what BLM requires.

Notice-Level Bonding

14.16 **Comment:** And finally, our industry, as represented by our association, strongly urges you to consider the bonding of all size operations, even at the Notice level.

Response: The proposed final regulations require operators to post a financial guarantee for all activities other than casual use.

14.17 **Comment:** Financial guarantees for Notice-level operations are appropriate, but BLM should address this issue under a separate rulemaking and should ensure that the provisions do not conflict with state laws that require the financial guarantee to be approved administratively by the local lead agency, not through a public hearing at the state level.

Response: The proposed final regulations are the result of a request by the Secretary of the Interior to update the surface management rules, including financial guarantees. Therefore, BLM chose to prepare an comprehensive package rather than a series of target rulemakings. The proposed final regulations through §3809.200 provide a mechanism for limiting conflicts with state laws and administration through agreements or memorandums of understanding between the state and BLM.

14.18 **Comment:** Require all Notice-and Plan-level operations to provide a financial guarantee that covers the estimated cost of reclamation and a sizable portion of worst-case disaster.

Response: We decided not to include a calculation for worst-case scenarios because of the uncertainty involved in making these calculations, and the additional burden of regulating financial assurances for events that may not occur.

14.19 **Comment:** We believe that the financial guarantee for Notice-level operations should be eliminated or established as a standard amount. It is not an effective use of BLM staff

time or money to recalculate the financial guarantee for small placer operations. In addition, small placer operators are unlikely to have the expertise to provide the financial guarantee required by these regulations.

Response: The proposed final regulations require that operators post a financial guarantee to ensure that reclamation takes place. The proposed final regulations do not prevent BLM field managers from implementing a financial guarantee program on a per-acre basis as long as the operator posts a financial guarantee acceptable to BLM. We can help small operators who do not understand the requirements.

14.20 **Comment:** I would like the bonding regulations to remain as they are. I can barely afford to buy supplies, and a bonding requirement for a small miner like me would be a genuine hardship. Existing regulations cover reclamation now, and bonding for Notice-level operations would be a severe hardship.

Response: The NRC report recommends that operators post a financial guarantee for all activities beyond casual use. The proposed final regulations must include such a provision or be inconsistent with the NRC report. Although certain operators may have difficulty in affording financial guarantees, this requirement is necessary to assure protection of public lands.

14.21 **Comment:** Establishing financial requirements for reclamation for Notice-level operations and penalties for noncompliance will ultimately cost the taxpayers more in administrative costs than simply spending the money to reclaim the few places where an individual or company has left their obligations.

Response: The purposes of this provision are to prevent unnecessary or undue degradation and to assure that the taxpayer does not have to pay for reclamation. Financial assurances are supposed to include administrative costs as well as direct reclamation costs. The program requirements are not expensive to implement and should result in a net benefit to taxpayers. In addition, the NRC report recommended that operators post a financial guarantee for all activities beyond casual use. The proposed final regulations must include such a provision, or they would be inconsistent with the report.

14.22 **Comment:** As an alternative to the proposed Notice-level bonding requirements described at 3809.554, I would suggest that Notice-level operators be given the option of determining bond costs using either a prescriptive formula based on dollars per acre disturbed or a site-specific calculation of estimated reclamation costs. In general, I believe the imposing of one-size-fits-all reclamation and performance standards is inappropriate. Developing reclamation costs estimates will be a burdensome and costly task, and for some sites the cost of obtaining the reclamation cost estimate could exceed the cost of the required reclamation.

Response: This comment is similar to a discussion in the NRC report. In the proposed final regulations the amount of the financial guarantee must be for the estimated reclamation cost. But the BLM field manager can establish a fixed rate schedule to make streamline bond calculations and adjust it if a specific operation would clearly result in a greater or lesser reclamation cost.

14.23 **Comment:** BLM proposes to require bonding for Notice-level activities. Kinross does not support such bonding because in our experience these activities have not resulted in unnecessary or undue degradation. Exploration operations disturbing 5 acres or less should not have to submit a detailed environmental review. The flexibility for timely permitting of exploration is essential since the time of year suitable for exploration is limited in many parts of Idaho to June through October. Kinross would consider reviewing a proposal from BLM that would require bonding for Notice-level activities that use chemicals.

Response: BLM has identified Notice-level activities that result in unnecessary or undue degradation through lack of reclamation performance. Financial assurances for exploration activities would ensure performance of reclamation, protecting against unnecessary or undue degradation. As the rules are implemented, the amount of a bond required for exploration activities in various areas would become fairly routine, and this should not cause substantial delay's or problems. Moreover, BLM cannot implement this suggestion because it would be inconsistent with the NRC (1999) report.

14.24 **Comment:** How should we interpret the term "minimally," such as using a dollar threshold? The term should not be used unless it is defined by example in each location where used. Setting a dollar threshold would not be suitable in most instances. The use of Notice-level operations as now in the existing regulations has proven to be an excellent threshold mechanism, and this should be used in the future. It would be appropriate, in addition to using a 5-acre threshold, to have say a 25-acre threshold with an intermediate level of requirements

Response: BLM cannot implement this suggestion because it would be inconsistent with the NRC report.

14.25 **Comment:** 3809.503(b) "Your notice was on file...and you choose to modify your notice..." Does an operator need to provide a financial guarantee for only the modification, or for the entire Notice (both the preexisting operations and the proposed modifications)? This should be clarified in the regs.

Response: We agree with the comment. BLM modified the language in the proposed final regulations to make clear that a financial guarantee must be posted for the entire Notice if the operator modifies it.

14.26 **Comment:** Persons engaged in Notice-level mining disturbing less than 5 acres of surface area should need no bonding if they are not using cyanide or conducting leach operations. Not requiring bonding would encourage searches for new mineral deposits, allow new mineral collecting sites to be found, and allow the rockhounding hobby to continue. It would also allow many small mining operations to continue to operate and employ people rather than placing them on the unemployment roles.

Response: BLM has determined that all surface disturbing activities exceeding casual use should be covered by a financial assurance and not just those using cyanide or conducting leaching operations. BLM cannot implement the suggestion because it would be inconsistent with the NRC report and would not ensure reclamation of public lands.

14.27 **Comment:** California requires a financial assurance for all surface mining operations that produce more than a 1,000 cubic yards or disturb more than 1 acre. A person reading the proposed regulation might conclude that they did not need a financial guarantee when, in fact, one may be required by the state.

Response: The proposed final regulations are clear that states may impose requirements beyond what BLM requires.

14.28 **Comment:** The New Mexico Energy and Mineral Natural Resources Department recommends that BLM distinguish between exploration operations and mining operations relative to the requirement for a financial guarantee. The Department recommends dropping the requirement for financial guarantees for exploration operations under 5 acres of actual disturbance.

Response: BLM cannot implement this suggestion because it would be inconsistent with the NRC report.

14.29 **Comment:** For the most part the comments and recommendations of the NRC are valid and appropriate. In one area, that of bonding, the committee stepped into a legal and financial quagmire that it could not have appreciated. Obviously, the recommendation that all except the most minor disturbances be bonded was appropriate, if not necessary, if one considers only reclamation. But there are at most 651 acres of land that could be classified as needing but not receiving reclamation. That is a minuscule problem that does not warrant imposing draconian bonding requirements.

Response: BLM does not regard postings of financial assurances as "draconian". BLM believes the amount of acreage in need of reclamation that is unbonded considerably exceeds 651 acres. A 1999 survey of BLM field offices identified over 500 operations where the operator had abandoned the property and left BLM with the reclamation responsibilities. The proposed final regulations must require the posting of financial guarantees for all activities beyond casual use. Not to do so would be inconsistent with

the NRC report.

14.30 **Comment:** As in previous correspondence we recommend that Notice-level operations be separated into categories as either exploration or mining operations, and that exploration operations under 5 acres not be required to provide financial assurance.

Response: The proposed final regulations must require the posting of financial guarantees for all activities beyond casual use. Not to do so would be inconsistent with the NRC report.

Conversion Period for Bonds

14.31 **Comment:** The conversion period under 3809.505 should be extended to 1 year. Proposed §3809.505 gives an existing operator 180 days from the effective date of the final rule to comply with the financial guarantee requirements. Because many operations are affected seasonally, this period should be extended to 1 calendar year, assuring that the operator has the benefit of one complete season as may be needed to effect reclamation and closure under his existing Notice or Plan, if he so chooses.

Response: BLM decided to leave the 180-day transition period in place because this period gives the operator ample time to come into compliance. Because most operations now run under Plans and will already be complying with these provisions, we believe few if any operations will be affected. But if an existing Plan of Operations does not have a financial guarantee meeting the requirements of this subpart, the guarantee needs to be upgraded. Unlike Notice-level activities, Plan-level operations usually result in significant on-the-ground disturbance and other impacts. If the operator cannot secure an adequate financial guarantee in 180 days, we believe that BLM can justifiably say the operation poses a potential threat and take appropriate action.

14.32 **Comment:** 3809.505 must be clarified in one important respect. Otherwise, those who wish to obstruct or delay mining can "make a case" under its language that we assume the agency does not intend. Each operator with an approved Plan on the effective date of the final rule must conform its "financial guarantee" (bond) to the new bonding requirements within 180 days. But section 3809.500(b) requires the provision of a bond meeting the new bonding requirements "before starting operations." Please state the following in section 3809.505, "This obligation does not affect your right to continue to operate under the approved Plan of Operations both before and after complying with the obligation in this section." A less satisfactory alternative would be to make this statement in the preamble to section 3809.500 or .505, or both.

Response: We agree with your comment. BLM amended the proposed regulations to make clear that operations may continue during the 180-day transition period.

14.33 **Comment:** Once bond is posted, BLM should be obligated to help protect the claim holder's mineral rights and bonds from the actions of trespass miners. Is BLM prepared to do this, or is BLM going to make claim holders responsible for the actions of trespass miners and cause claimholders to forfeit their bonds when someone else makes minor surface disturbance? If so, lawsuits will be frequent and costly, taxpayers will suffer, and funds that could be spent on enhancements will be wasted in litigation.

Response: Nothing in the proposed final regulations alters the rights and responsibilities of mining claimants. To date we are unaware of any bond forfeiture or law suit caused by a third-party trespass. Regardless of whether there is a financial guarantee, claimants and operators are responsible for completing reclamation. Disputes between claimants are heard in state courts.

Type of Financial Guarantees

14.34 **Comment:** My specific recommendation requests including insurance as an acceptable form of financial guarantee.

Response: We agree with the recommendation. The proposed final regulations include insurance as an acceptable form of financial guarantee.

14.35 **Comment:** Operators' liability insurance should be considered as additional funding mechanism

Response: We did not include operators' liability insurance because we consider liability insurance to be more suitable for work-related liability, such as worker injury as opposed to liability for completing reclamation. Companies routinely acquire this type of insurance, and although it would normally cover unintended events during mining, such insurance might not cover post mining liabilities.

14.36 **Comment:** NMA suggests that this list should include a publicly traded company's own securities. BLM could protect against fluctuations in stock and bond prices by conducting a periodic review and adjusting the amount of securities required to be held. For small entities in particular, BLM should consider including the salvage value of equipment and other property at the site; this could be an innovative way of reducing the burden of financial assurance on small operators conducting Notice-level operations.

Response: The proposed final regulations allow BLM to accept "investment-grade securities having a Standard & Poor's rating of AAA or AA or an equivalent rating from a nationally recognized securities rating service." The proposed final regulations do not specify whether the securities must be of another entity. BLM could not accept securities that do not meet this criterion. Were we to do so, the securities would more appropriately be considered a self-bonding instrument. The proposed final regulations do not permit

BLM to accept new corporate guarantees. BLM can explore creative forms of guarantees with the states. But this suggestion is not the proper forum for rulemaking. If we determine that a "creative" method is worth including in the list of acceptable instruments, we can incorporate such methods in a separate rulemaking. BLM does not want to include the salvage value of equipment and property because we have no control over its use or disposition. Furthermore, such assets would likely be part of the bankruptcy estate in the event an operator went bankrupt, and not available to BLM.

14.37 **Comment:** What is the benefit of blanket financial assurance? Does it just provide administrative ease to the party, or is there an additional financial incentive?

Response: The proposed final regulations continue to allow blanket guarantees. The system has been in place for many years, does provide administrative convenience to both the operator and BLM, and is used successfully in other BLM programs. There is no reason to believe that a blanket guarantee increases BLM's risk of having to use taxpayer funds to reclaim operations. The field manager must still review the blanket guarantee and be certain that enough funds are available should an operator not complete reclamation for whatever reason.

14.38 **Comment:** All alternatives should contain provisions for federal agencies being able only to accept bonds from entities listed by the U.S. Federal Treasury under Circular 570. This restriction limits foreign bonding capabilities.

Response: We agree that BLM can accept only sureties listed in Circular 570 and have made this change in the proposed final regulations.

14.39 **Comment:** Because financial assurance requirements can be costly and complex for small operators, we believe BLM should consider funding mechanisms that could address cost and complexity issues. These issues could include bonding pool arrangements, liens on property, or other mechanisms. The states have been dealing with the issue of financial assurance for small entities for at least the last 10 years, and they are a laboratory of ideas for creative mechanisms from which BLM could draw.

Response: BLM can explore creative forms of guarantees with the states. But this suggestion is not the proper forum for rulemaking. If we determine a "creative" method is worth including in the list of acceptable instruments, we can incorporate that in a separate rulemaking. The proposed final regulations contain many options for small companies to use to post a financial guarantee.

14.40 **Comment:** It is important that the obligated party conducting the mining be specified as the obligated party on the financial guarantee instrument. If the responsible operator is not the principal on a surety company's bond, the surety company might refuse to pay the bond amount in a forfeiture.

Response: BLM will not accept a financial guarantee unless the obligated party is the operator of record.

14.41 **Comment:** Add a requirement that individual financial guarantee instruments be executed on forms prescribed and furnished by BLM. Otherwise, terms and conditions stated on the instruments could conflict with your regulations and create burdensome or restrictive conditions on BLM. The use of BLM standard forms gives control over the language and the terms and conditions in the instruments.

Response: The BLM field manager must ensure that the financial guarantee is properly executed. There is no need for a new form.

14.42 **Comment:** As history demonstrates and common sense dictates, BLM cannot give "assurance" of adequate reclamation bonding through these methods. Therefore, these portions of the discussion section cannot legally, under the terms of Congress' mandate to BLM, be incorporated into or even allowed under the final regulations. Overall, bond pools and any form of corporate assurance or self-insurance is inconsistent with NRC Recommendations 1 and 14 and must be stricken.

Response: The term "assurance" requires subjective analysis. The proposed final regulations are consistent with the NRC report because it provides the best reasonable assurance that financial guarantees will be adequate. In all cases the BLM state director determines that the state bond pool adequately assures that reclamation will be performed. The proposed final regulations do not permit new corporate assurance instruments.

14.43 **Comment:** Section 3809.555 should be amended as follows: (f) The BLM may approve, as part of a State or Federal program, an alternative financial assurance system, if it will achieve the following objectives and purposes of the bonding program; (1)The alternative must assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas that may be in default at any time; and (2)The alternative must provide a substantial economic incentive for the permittee to comply with all reclamation provisions.

Including the above language in the final rule will give BLM flexibility and regulatory authority to consider new forms of financial assurance that will benefit the industry, the government, and the environment.

Response: The proposed final regulations provide for a wide variety of specific instruments. We do not want to include in the proposed final regulations an option that permits unspecified instruments. Therefore we did not adopt this suggestion.

14.44 **Comment:** Accepting investment grade securities brings the government dangerously

close to accepting corporate guarantees, which must be avoided at all costs. If these securities are to be considered as guarantees, the government must ensure that it is the highest creditor and would be first in line to redeem whatever assets are available in the event of the company's bankruptcy.

Response: The review process we are implementing for accepting investment grade securities seeks to minimize the risk to the government.

14.45 **Comment:** Add a requirement that operators must replace an expiring letter of credit with other equivalent financial assurance at lease 30 days before expiration. Require that banks give notice to BLM at least 90 days in advance if the bank will not be extending the letter of credit for another term. This is important because a letter of credit may be irrevocable, but it is not everlasting.

Response: BLM chose not to add language on expiring letters of credit because in most cases the letter of credit will be for a significant time period. BLM will be periodically reviewing the adequacy of financial guarantees, and the field manager will be aware of any letter of credit that is about to expire and take action. Redeeming a letter of credit solely because it is about to expire would not be consistent with the objective of the proposed regulations. We would redeem the letter of credit only if the operator were unwilling or unable to complete reclamation, or unable to provide a replacement at expiration.

Estimated Cost of Reclamation

14.46 **Comment:** Reclamation bonding for BLM's cost for revegetation, recontouring, moving and segregating topsoil, pit backfilling and so forth would be prohibitive.

Response: The proposed regulations require operators to post a financial guarantee for all activities other than casual use and to estimate the cost as if BLM were to contract out the work. This measure is necessary because if we did not do so, there would be a risk that BLM would have to spend taxpayer money to properly reclaim a site should the operator be unwilling or unable to complete reclamation. BLM cannot use operator costs because it has to be assumed the operator would not be available to conduct the work in a bond forfeiture situation.

14.47 **Comment:** Bonding should not be based on a modeler's guess of what will happen because all models are uncertain. BLM should establish a procedure for accounting for uncertainty. A mine next to a river may have impacts that possibly range from nothing at all to a complete cessation of flow during dry periods. The first has no financial implications, whereas the latter may cost society hundreds of millions of dollars. Currently the models usually predict an outcome close to the no impact scenario. Slight changes in the models, as I have tested, have resulted in the maximum impact. Modelers have assumed away the worst impacts. We do not expect BLM to require bonding sufficient

for the worst-case scenario, but should consider the possibility of the worst case. Uncertainty analysis in modeling should be used to determine the possibility that certain impacts will occur. In the scenario described above, what is the chance that the river will go dry? What is the chance that there will be no impacts? Uncertainty analysis can determine these probabilities. The bond should reflect a combination of total damages for each scenario and the probability that they will occur.

Response: The amount of a financial guarantee is determined on a case-by-case basis, based on an engineered estimate of the costs to implement the approved reclamation plan. This includes a certain percentage for contingencies and redesign as is standard in any cost estimating process. However, the reclamation bond does not include the cost of remediation from unanticipated or unplanned events with a low probability of occurrence. That is a separate issue outside of reclamation bonding. The proposed regulations provide the framework, but a regulation is not the proper place to include a detailed process, especially for a process that can be so uncertain..

14.48 **Comment:** 3809.210(c)(4) It appears from this provision that a mine could be double bonded for some parts of an operation since the bond "must be calculated based on the completion of both Federal and State reclamation requirements." Please clarify.

Response: The proposed final regulations provide a mechanism through an agreement between the state and BLM to accept the same bond and avoid a “double bonding” situation.

14.49 **Comment:** EPA suggests that the rulemaking include revisions to 43 CFR 3809.1-9 that would make these enforceable. The current rule requires that, in determining the amount of the bond, the authorized officer shall consider the estimated cost of reasonable stabilization and reclamation of areas disturbed. EPA suggests that BLM consider allowing the authorized officer to consider other costs that the public may incur because of an operator’s failure to meet the requirements of part 3809. This would cover the situation where the public may have to bear on- and off-site remediation costs greater than the amount needed merely to complete stabilization and reclamation of the areas disturbed.

Response: Financial assurances must cover all reclamation obligations. Although the initial bond amount does not cover unexpected off-site remediation, once off-site damage occurs that must be reclaimed, the financial assurance must be adjusted to cover these obligations.

14.50 **Comment:** The proposed rule recognizes that providing adequate financial guarantees for environmental impacts from mining requires either catastrophic insurance or reserve funds both during the normal course of design operations for new mining ventures and for older, existing mines. But lack of specificity in portions of the rule as proposed may allow

inadequate financial coverage and unfunded costs to the public. EPA strongly recommends that the regulation contain a provision that requires acid rock drainage analysis of waste rock and tailings throughout the life of the mine to assure that acid rock drainage is not occurring, and if it does occur, allowing prompt intervention. Variations in bonding requirements under the proposed alternatives have not adequately disclosed the potential impacts of these options.

Response: BLM believes that the proposed final regulations adequately provide for determining the correct amount of bond in respect to addressing reclamation needs associated with managing acid rock drainage. Testing to determine the potential of mined materials to generate acid drainage, or other undesirable leachate, and ongoing monitoring, is a site- and project-specific component that the operator must include in a proposed Plan of Operations. This is provided for in the proposed final regulations at 3809.401. Periodic reviews of bond amounts during the life of the operation, and before mine closure, are also provided for in the proposed final regulations to identify changes in environmental circumstances, such as the development of ARD. These reviews allow the reclamation plan to be modified and the reclamation bond adjusted in response to changing conditions.

14.51 **Comment:** Bonding requirements should be amended to allow the amount of bond to be based on the potential for offsite impacts on water resources, including impacts that may be manifest on subsurface resources. "[T]he authorized officer shall consider the estimated cost of reasonable stabilization and reclamation of areas disturbed." Some may interpret this not to include subsurface or offsite resources. Therefore, the bonding requirements should be changed to adequately reflect the impact of mining on the environment. Also, a provision should allow a portion of the bond to be held beyond the actual surface reclamation of the mining site. This portion would be based on the time for offsite impacts on water resources and other resources. It is impossible to ascertain "on inspection" that the offsite impacts will not occur. The drawdown cone created around a mine from dewatering will continue to expand after dewatering ceases.

Response: BLM decided that the proposed final regulations should include reclamation bonding at the estimated cost of the actual approved reclamation plan. We seriously considered including a financial guarantee for unplanned events as described by this comment, but we decided not to do so after reading many comments opposing the concept because of the difficulty establishing a liability level and in obtaining a bond for unspecified events.

14.52 **Comment:** 3809.554 provides criteria for estimating reclamation costs. Again, state programs that have published financial assurance guidelines should be reviewed and a model for changes in the criteria for establishing costs based on the approved reclamation plan and the actual acreage disturbed.

Response: We decided not to include state-specific procedures in the proposed final regulations, but this does not preclude working with a state under an agreement.

14.53 **Comment:** By incorporating provisions for financial guarantees, the proposed final regulations require third-party reclamation, which ensures Davis-Bacon wages, which guarantees that there will be $400 hammers included in those costs. This is ridiculous.

Response: The arguments that third-party contracts include Bacon-Davis wages in the calculation is something BLM and all federal agencies require as a matter of law. We cannot change that.

14.54 **Comment:** Revise .552(b) to require an annual report from BLM to the owner/operator that the financial guarantee is, (a) adequate, or (b) excessive and the amount it will be reduced, or (c) deficient and the reasons and amount that must be adjusted. This time frame and BLM decision should coincide with .553(b), which provides for an annual review by BLM. The concept of when the financial guarantee needs adjustment should be included in .552(b) rather than .556(c).

Response: BLM will regularly review the adequacy of a financial guarantee and require the operator to increase the guarantee if we determine that the current guarantee is inadequate. This review is more efficient than having to send a report telling the operator that nothing needs be done. Conversely, operators may ask BLM to reduce the guarantee if they believe circumstances warrant a reduction.

14.55 **Comment:** As a more effective way to achieve the same apparent objective, Barrick suggests that BLM, through guidance, direct its field offices to include a discussion of the applicable methodology for financial guarantee calculations in NEPA documents and encourage public comment on that issue in accord with other NEPA requirements and procedures.

Response: The proposed final regulations encourage public discussion of the financial guarantee as part of the EIS process. A 30-day comment period is provided for all Plans of Operations. During that time the public is encouraged to comment on any aspect of the Plan, including the estimated or preliminary reclamation bond amounts.

14.56 **Comment:** Standard bond amounts should be determined on the basis of the activity-terrain matrix, on a state-by-state basis, and in some instances on an administrative-unit basis. A standard bond amount should be developed for all mining operations that fall into activity-terrain categories where an environmental assessment/finding of no significant impact is the method for NEPA compliance by BLM and the Forest Service. If not in the activity-terrain matrix, then it is likely that an EIS is required. In the event of an EIS, the NEPA process is the suitable place to determine the type and amount of financial guarantee needed to assure compliance with the approved Plan of Operations.

Response: The proposed final regulations permit field managers to establish standard financial guarantee amounts provided that the amount is adequate to assure reclamation of each Notice- or Plan-level operation.

14.57 **Comment:** We recommend that the regulations be amended to provide greater direction and detail on the minimum information that should be included in determining reclamation cost.

Response: The proposed final regulations are clear that the operator must base estimates of reclamation costs on the Plan of Operations. The scope of Plans vary widely. BLM manuals are a more appropriate place to include more direction on estimating reclamation costs.

14.58 **Comment:** BLM's 1997 bonding regulations requiring certification of bonding amounts by an independent, third-party professional engineer should be reinstated. Independent certification lends an important measure of credibility to the calculated reclamation costs.

Response: We did not adopt this recommendation. The experience we had with this proposal suggests that it is overly burdensome on industry and does not add a commensurate degree of protection. The BLM field manager remains responsible for assuring that an adequate financial guarantee is posted. Also, the proposed final regulations give the public more opportunities to comment on the amount of the financial guarantee.

14.59 **Comment:** Revise .552(a) to be consistent with NRC study Recommendations 1 and 2. This section should also specify that any BLM administrative costs of the default of an individual financial guarantee be expressly limited to the direct costs of BLM staff directly responsible for implementing the approved reclamation plan.

Response: This section of the proposed final regulations is not inconsistent with the NRC report. It contributes to assuring that a financial guarantee will be adequate to pay for reclamation. This requires the guarantee to include adequate funding to pay for BLM administrative costs if BLM must administer a third-party contract.

14.60 **Comment:** Delete .556 since .552(b) provides that BLM is responsible for at least annual review of the adequacy of any funding mechanism. The basic thrust of the proposed final regulations is that the owner/operator gives BLM full financial guarantees, including BLM administrative costs in the event of default. An arbitrary figure of 10% change is neither fair nor appropriate for either small or large mining operations. For example 10% of a financial guarantee of $1,000 for a simple exploration program involving 200 square feet for a drill placement without building a pad significantly differs from 10% for a $100 million financial guarantee.

Response: Section 556 applies to financial guarantee instruments that fluctuate in value and therefore require more scrutiny to assure that an adequate financial guarantee continues to exist. Whether the guarantee is $1,000 or $100 million, it must be adequate to assure that the taxpayer will not have to pay for reclamation.

Corporate Guarantees

14.61 **Comment:** We believe that there are two excellent sources for a corporate guarantee standard: (1) the Nevada reclamation regulations governing the provision of surety and (2) regulations adopted under Subtitle C of the Resource Conservation and Recovery Act (RCRA) for the financial assurance of closure and abandonment costs. These regulations have been in effect for quite some time and have proven both workable and effective. There is no reason for BLM to reinvent the wheel at this juncture. Notably, the standards adopted under the two programs are similar, although the RCRA standard contains an alternative method not used in Nevada. The Nevada regulations provide that a corporate guarantee is acceptable if the following four conditions are satisfied:

-The corporation has two of the following three ratios: total liability to stockholder's equity less than 2 to 1; the sum of net income plus depreciation, depletion and amortization to total liabilities greater than 0.1 to 1; and current assets to current liabilities greater than 1.5 to 1;
-Net working capital and tangible net worth each equals or exceeds the estimated reclamation costs.
-Net corporate worth of at least $10 million.
-Either 90% of the corporation's assets or assets valued at six times the estimated reclamation costs are in the United States.

Response: The proposed final regulations will not permit new corporate guarantees. BLM has determined that corporate guarantees, as a result of market fluctuations, do not give the Secretary of the Interior the level of protection that the Secretary should have. Nor do corporate guarantees provide adequate protection for the taxpayer in bankruptcy situations. We will allow guarantees in place on the effective date of the final regulations to remain in place.

14.62 **Comment:** The Resource Conservation and Recovery Act (RCRA) regulations differ only in that they require that the corporation's net working capital and tangible net worth each be at least six times the estimated closure and abandonment costs. In addition, under RCRA, a corporation may rely upon a corporate financial guarantee if the corporation's most recent bond issuance is rated AAA, AA, A, or BBB by Standard and Poor's, or Aaa, Aa, A, or Baa by Moody's. A corporation meeting that test need not demonstrate that it satisfies the ratio test described above.

Response: The proposed final regulations will not permit new corporate guarantees.

BLM determined that corporate guarantees, as a result of market fluctuations, do not provide the Secretary of the Interior with the level of protection that the Secretary should have. We will allow those in place on the date the proposed final regulations become effective to remain in place.

14.63 **Comment:** Subsection (b), requiring an operator to provide financial guarantee to a state "under an approved agreement" is inconsistent with proposed 3809.570, which provides criteria for a state-approved financial guarantee and does not require that the state have an "approved program." Proposed 3809.500(b) should be modified to delete the reference to an "approved program," and instead, should cross-reference 3809.570. Acceptance of a state-approved bond should not be limited to states with approved programs, particularly under the onerous provisions of the working draft.

Response: The language in §3809.500(b) does not refer to state-approved programs We believe §3809.570 is clear that a state-approved bond does not depend on a BLM-state agreement.

14.64 **Comment:** It is inappropriate to establish set bond limits for major hardrock mining operations on public lands in the West. Instead, the Department of the Interior needs to develop a comprehensive approach to financial assurances that ensures the full costs of reclamation are identified up front, and contingency bonds are provided for unforseen activities and for post-closure operations at the mine site.

Response: The proposed final regulations did not adopt the recommendation to provide for contingency bonds for unforseen events due to the difficulty in establishing a bond amount and probability threshold; and the difficulty operators would have in obtaining such bond coverage. However, operators are still responsible for remediation of impacts caused by their operations from unplanned events. The proposed final regulations do not limit the amount of financial guarantees for costs associated with implementing the approved reclamation plan, including costs for post-closure long term maintenance and water treatment.

Long-Term Funding

14.65 **Comment:** While some revisions to the bonding rules are appropriate, other portions of the proposed rules are troubling because they reflect an extension of BLM's authority beyond that established by the Federal Land Policy and Management Act (FLPMA). For example, in proposed Section 552(c), BLM could require funding for long-term treatment to ensure water quality standards or for "other long term, post-mining maintenance requirements." BLM offers no basis for its assertion of such authority other than to point to the unnecessary or undue degradation provisions in FLPMA. The link is very tenuous. FLPMA does not grant BLM the authority to bond for speculative, future impacts, but for reclamation of disturbed lands.

Response: BLM believes that FLPMA section 302(b) requiring the Secretary to prevent "unnecessary or undue degradation" provides ample authority for this provision. BLM is not bonding for "speculative, future impacts," but is bonding for activity that is known and planned to be implemented as part of the approved reclamation plan. In many cases it is known that long-term treatment and site maintenance will be necessary and must be provided for as part of the reclamation bond.

14.66 **Comment:** 3809.552(c): "When BLM identifies a need for it, you must establish a trust fund or other funding mechanism available to BLM to ensure the continuation of long-term treatment to achieve water quality standards and for other long-term, post-mining maintenance requirements." How will "need" be defined? How will this be implemented?

Response: BLM did not attempt to define "need" because need will differ on a case-by-case basis. BLM believes that allowing local field managers to work with operators to determine need is preferable to trying to force a one-size-fits-all set of criteria. Most of the time the need will be established through the review and evaluation process conducted as part of the project NEPA analysis, or associated with the development of NPDES/State discharge permits.

14.67 **Comment:** Revise .552(c) to include a table showing the basis for any BLM determination that a trust fund or other funding mechanism will not be arbitrary and capricious and does not duplicate authority and responsibility of other federal or state entities for "long-term" water quality treatment and/or monitoring to meet water quality standards included in a mining operation. Further, any requirement for maintaining water quality standards is the exclusive responsibility of the state or from EPA.

Response: §3809.552 (c) clearly states the conditions when BLM will require a long-term funding mechanism. Because of the different nature of each operation, it is not reasonable to establish a list of criteria. The Secretary of the Interior has the responsibility to prevent unnecessary or undue degradation on public lands, including the degrading of water quality. But BLM does not establish the water quality standards.

14.68 **Comment:** BLM should leave implementation of the Clean Water Act to EPA or state programs that have primacy as defined by EPA. Congress has already delegated this authority to EPA. Regarding prediction of acid rock drainage, this is a well-developed area of expertise and BLM's determination of the statistically adequate number of samples should be based on this expertise. Statistical validity of sampling for acid rock drainage prediction must consider geology and mineralogy, and testing should follow a phased approach of static testing followed by kinetic testing. A determination that acid rock drainage will not occur should eliminate the need for funding for long-term water treatment.

Response: The BLM field manager will determine on a case-by-case basis whether the operator must establish a trust fund. The likelihood that ARD will or will not occur is only one factor in determining the need for long term water treatment. §3809.552 (c) states the conditions when BLM will require a long term funding mechanism. Due to the different nature of each operation it is not reasonable to establish a list of criteria. The Secretary has the responsibility to prevent unnecessary or undue degradation on public lands, including the degrading of water quality. However, BLM does not establish the numeric water quality standards.

14.69 **Comment:** With respect to proposed 3809.552, BLM also has no authority under FLPMA to require the operator to establish a trust fund or other funding mechanism available to BLM to ensure continuation of long-term water treatment and other postmining maintenance requirements. The proposed regulation states that it will be required if BLM identifies a need for it. No criteria are specified to guide BLM and the operator as to what would constitute a need. Furthermore, financial guarantees, such as bonds, provide adequate protection.

Response: BLM addressed its authority under FLPMA in the preamble to the proposed rule (see 64 FR 64 42). The Secretary's responsibility to prevent unnecessary or undue degradation of the federal lands provides broad authority, including the authority to protect water quality. Long-term water treatment is but one component in a comprehensive reclamation plan that would be used to reclaim the public lands. Reclamation bonding is used to assure that the reclamation plan gets implemented. A trust fund is the most efficient way to fund long term, reoccurring costs such as those associated with post-closure water treatment or site maintenance. However, the operator can propose alternative funding mechanisms as long as they provide an adequate level of financial assurance that the taxpayer will not bear the cost of reclamation.

14.70 **Comment:** The bonding regulations proposed to release bonds for water quality after the mine is closed for 1 year without untreated discharge exceeding water quality requirements. I don't believe that 1 year is an acceptable time period. Ground water contaminants often move less than a few hundred feet per year, and the monitoring point may be thousands of feet away. As I discovered in my review of the ground water analysis at Zortman-Landusky in Montana, it is very possible that contaminants may not be observed for years after closure. I suggest that the regulations be rewritten to allow the water quality bond to be released after a time to be determined from an adequate ground and surface water modeling exercise. Because of the vast uncertainties in any modeling estimate, the predicted time from the model should be increased by about 50% before the bond is released.

Response: The bond released after the 1 year period is the bond held for performance of the surface reclamation work, not the amount held for water treatment. If water treatment becomes necessary after release of the surface reclamation bond, the operator is still

responsible for the treatment and portions of the water treatment bond would be used to fund the treatment activity.

14.71 **Comment:** Barrick understands BLM's concerns about interim site maintenance but believes that the proposed regulation is an inappropriate reaction to several isolated problems. BLM has not adequately considered the impacts of the proposed rule or alternatives that would achieve the same objective. The requirement that some portion of the financial guarantee be "immediately redeemable" by BLM at BLM's discretion will impose a significant cost on operators, particularly small operators, because it may require a substantial cash bond.

Response: BLM has deleted this requirement from the proposed final regulations.

14.72 **Comment:** In lieu of the new language proposed in 3809.552(a), commenters recommend that the Department of the Interior consider contingency bonds to cover worst-case scenarios of mining operations.

Response: We considered contingency bonding and decided not to include it in the regulations due to the difficulty in predicting unplanned events and an associated remediation cost; and due to operator difficulty in obtaining bond coverage.

Self-Bonding

14.73 **Comment:** The current draft rule allows for self-bonding. Bonds should be held by an independent third party.

Response: The proposed final regulations allow corporate (self) bonding to continue for corporate guarantees in place on the effective date of the final regulations. No new corporate guarantees will be permitted due to the risk of nonpayment and difficulty tracking corporate solvency.

14.74 **Comment:** We would like to see stronger rules expecting significantly more third-party bonding (NOT self-bonding) for the mining companies so we taxpayers don't end up footing the bill for expensive toxic cleanup when a mining company declares bankruptcy to get out of paying its own bill for cleanup. Please raise the bonding limits much higher to cover such unexpected pollution happenings.

Response: The proposed final rules do not allow new corporate guarantees (self-bonding). The reclamation bond amount that must be provided by operators has to be adequate to cover all anticipated costs of reclamation, including post-closure site maintenance and water treatment. BLM decided not to try and bond for unanticipated events such as spills or failures due to the difficulty in establishing an acceptable risk threshold, remediation cost structure, and the difficulty operators would have in obtaining

bonds for such hypothetical events. Such events are better covered by operator liability insurance than by reclamation bonds.

14.75 **Comment:** BLM specifically requests comments or suggestions on an appropriate standard for an acceptable corporate guarantee 64 Fed. Reg. 6422, 6443. It is important that BLM's bonding provisions retain the opportunity for corporate guarantees in certain circumstances. BLM should review the detailed corporate guarantee provisions in Nevada's program. See generally Nevada Admin. Code 519A.350. Those provisions function effectively and assure that the reclamation costs of operations that rely on the corporate guarantee are adequately covered.

Response: The proposed final regulations allow corporate (self) bonding to continue for those corporate guarantees in place on the effective date of the proposed final regulations. BLM will not accept new corporate guarantees.

14.76 **Comment:** An acceptable corporate guarantee should follow the precedent established by the Outer Continental Shelf Act. There an acceptable corporate guarantee is defined as an excess of assets over liabilities on a company's audited financial statements, which is sufficient to cover the outstanding obligation. This test can be applied annually to allow for adjustments for changing market conditions.

Response: The suggestion to use the OCS or other models would require BLM to evaluate assets, liabilities, and net worth. Some even require judging the ratio of net worth held in the United States. Annual reviews would be needed. BLM does not currently have the expertise to perform these accounting functions, and we determined that we could not diminish the overall risk in allowing additional corporate guarantees by acquiring such expertise.

State Guarantees

14.77 **Comment:** Revise .570(c) to provide that the state guarantee need not include BLM costs for issuing a third-party contract in the event of a default when the state agreement provides for the state to implement the jointly approved reclamation plan that is in default.

Response: If BLM calls the financial guarantee, the guarantee must pay all costs. Because BLM incurs administrative costs for issuing and monitoring third-party contracts, it is appropriate to estimate those costs when determining the amount of a financial guarantee BLM will require.

14.78 **Comment:** Revise .572 to require that the state be formally notified that BLM has rejected a state-approved financial guarantee. BLM's notification the state should also specifically explain why BLM rejected the state-approved financial guarantee. The BLM decision to the owner/operator and notice to the state should be appealable and provide

that in the event of an appeal, BLM would temporarily accept the state-approved financial guarantee when the state confirms to BLM that the owner/operator is considered a bonafide entity in good standing with the state. The time standard should read 30 calendar days.

Response: The proposed final regulations now use 30 calendar days as the norm and also states that BLM will notify a state if BLM does not accept a state-approved financial guarantee.

14.79 **Comment:** Adoption of the proposed final regulations will eliminate joint bonding between the states and BLM. Page 45 of the draft EIS states that financial guarantees would allow equivalent bonding by state agencies but only if the bonding instrument is also redeemable by the Secretary of the Interior. At this time I have no knowledge of a bonding company or financial institution that will provide a bonding instrument that is redeemable by multiple agencies.

Response: We believe that making a financial guarantee redeemable by the Secretary is a fundamental principle of the financial guarantee program. Such a guarantee can be made to work and surety companies are likely to accept the notion.

14.80 **Comment:** State bond pools and state-accepted corporate guarantees offer limited protection. This applies to the stock of corporations and their corporate entities that are engaged in the mining operation. Blanket statewide bond pools are costly to maintain and must have a regular actuarial accounting to assure solvency. It is also difficult to establish "fair and equitable" contributions. One large cost recovery claim can readily exceed the pool. State-accepted corporate guarantees should at best be applied only to corporations holding an investment-grade financial rating. Otherwise, such alleged corporate guarantees will not be available for BLM use in the event of bankruptcy proceedings.

Response: We believe that continuing to use state bond pools is in the interest of all parties, especially small miners who might have difficulty obtaining a financial guarantee from other sources. The BLM state director will have to determine whether the pool is sound (see §38090.571) before an operator could post a financial guarantee through the pool. To those who argue that one large claim would make the pool insolvent, we point out that should that occur, a means would have to be found to augment the remaining financial guarantees provided by the pool to comply with the requirements of the subpart.

14.81 **Comment:** BLM needs to follow the states' lead on corporate guarantees. Some states have programs that currently accept corporate guarantees, so the criteria are already set. If BLM changes that, there may be conflicts between states and BLM with no authority designated to resolve the disputes. If BLM has different criteria on a portion (public lands), then these criteria will lead to double bonding requirements.

Response: We believe that making a financial guarantee redeemable by the Secretary of the Interior is a fundamental principle of the financial guarantee program. Such a principle can be made to work, and surety companies are likely to accept the notion. BLM's intention is that this section be the basis for continuing joint state-BLM bonding. In §3809.203 we state clearly that if the financial guarantee is a single instrument, it must be redeemable by both the Secretary and the state. This section must be consistent with that requirement. But we recognize that sometimes state interests and federal interests are not the same. Our overriding principle is that the Secretary of the Interior is ultimately responsible for assuring that operators reclaim federal land after mining. This means that we must issue rules that protect the public, even if the states and the Federal Government will hold separate bonds. If, as a policy matter, this is unacceptable to a state, its legislature can act. Where state statute is not at issue, BLM-state memorandums of understanding may be crafted so as to continue current arrangements.

14.82 **Comment:** Section 3809.572 Clarification is needed on the criteria for which BLM may reject a state-approved financial guarantee. Is it solely based upon the acceptance criteria defined in Sections 3809.570 and 3809.571? If BLM rejects a state-approved financial guarantee, the agency must establish a time frame within which the operator can remedy the situation. Additionally, an appeal procedure must be established for resolving the discrepancy between the state and BLM on what is or isn't an acceptable guarantee.

Response: Section §3809.570 and 3809.571 established the criteria for BLM acceptance of a state approved financial guarantee. The proposed final regulations contain an appeal process for adversely affected parties. However, because typically a State is not a party to a BLM proceeding, BLM and the State should try to resolve issues between them through a consultative process. See §3809.800-3809.809.

14.83 **Comment:** 3809.570; 64 Fed. Reg. at 6464 concerning state-approved financial guarantees must be modified to conform to California law. Financial guarantees are effectively provided to local lead agencies, the state of California, and in many instances federal land managers without the concern for double bonding. BLM should review the state regulatory schemes and consider adopting similar language.

Response: BLM cannot adopt individual state rules but will work with states to achieve uniformity throughout a state and to avoid duplication, where possible.

14.84 **Comment:** We have two concerns with use of the state bond pool. Under this proposal BLM may recoup administrative costs of reclamation after an operator has defaulted. Since the state generally saves BLM significant funds by administering the bond pool, we believe BLM should not recoup administrative costs from the state bond pool. In addition, we recommend that the new rule contain provisions for states with bonding agreements with BLM to be able to audit all reclamation costs claimed under a default situation, when monies are drawn from the existing state bond pool.

Response: BLM must still administer any third-party contracts needed to reclaim land after operations, and this is a legitimate expense. As estimates of the amount of the financial guarantee are expected to consider the administration of contracts, it is not unreasonable to have proceeds from a state bond pool pay this expense. BLM believes it must include its direct and indirect administrative costs in calculating the estimated reclamation costs. These costs should apply to state bond pools as well. As to the second concern, BLM would work with the States to provide appropriate audits of monies used from the State bond pool.

14.85 **Comment:** Bonding pools, even actuarially sound ones, are NOT an acceptable form of guarantee. Bond pools, by definition, do not assure full bonding for a site. In addition, they are financially risky.

Response: The BLM State Director must determine if a state bond pool gives the government an adequate level of protection. If the state director determines it does, BLM will permit the use of state bond pools.

14.86 **Comment:** Actuarially sound bonding pools are an acceptable form of guarantee. But BLM must make a written determination that it is actuarially sound and renew this determination every year. Some state bond pools are financially shaky at present.

Response: The BLM State Director must determine if a state bond pool affords the government an adequate level of protection. If the state director determines it does, BLM will permit the use of state bond pools. The rules do not provide for annual BLM review of the bond pool but such a review may be performed if necessary.

Release of Financial Guarantee

14.87 **Comment:** The third and perhaps most essential aspect of preparing for future problems is to require adequate bonding. Current bonding requirements are generally based on area of land disturbed, but BLM does have significant leeway in this matter. The operator, "[a]t the discretion of the authorized officer, be required to furnish a bond in an amount specified by the authorized officer." This statement suggests that upon documenting potential impacts or uncertainty in the prediction of impacts, the authorized BLM officer should require adequate bonding to remedy problems that occur after operations have ceased. The requirement should include a provision to allow BLM to hold the bond for many years after the mine closed because of the time for pit lakes to refill.

Response: The proposed final regulations allow BLM to release a bond no earlier than 1 year after reclamation if the water quality of discharges is satisfactory or a long-term funding mechanism is in place to pay for treatment. We did so because we believe that after 1 year there is considerably less risk that something will go wrong. Allowing bonds

to be held indefinitely when reclamation is complete could likely make it more difficult for operators to obtain bonds. The proposed final regulations are also clear that release of the financial guarantee does not end the operator's liability if elements of the reclamation fail.

14.88 **Comment:** Another impossible suggestion is to make bonds for eternity. The proponents will say the proposals don't suggest this. Well, read it again and just think of how a liberal administrative judge, would interpret it. Even now it is practically impossible to have bonds replaced by other bonding companies when there is a change of ownership. The problems concerning release of liability on bonds are getting to be horrendous and it is now difficult to get bonds at reasonable prices. Just imagine what it will be like if a bonding company thinks it might be liable for the next thousand years. If the other regulations do not kill the mining industry, this one certainly will.

Response: Bonds will not be held forever following the completion of reclamation. The proposed final regulations allow BLM to release a bond no earlier than 1 year after reclamation if the water quality of discharges is satisfactory or a long-term funding mechanism is in place to pay for treatment. We did so because we believe that after 1 year there is considerably less risk that something will go wrong. The proposed final regulations are also clear that release of the financial guarantee does not end the operator's liability if elements of reclamation fail.

14.89 **Comment:** BLM must understand that surety underwriters are accepting the full risk of the reclamation obligation. If release of the guarantee is uncertain or too far into the future, surety simply will not be available, and certain guarantees will not be obtainable. Surety is a business, not a service. This business will not expose itself to unacceptable risks. In addition, "most appropriate technology and practices" is difficult or impossible to bond for, and has the potential to render many operations uneconomic. Bonding for site-specific applications best suited for the project are preferred.

Response: The proposed final regulations do not extend bond release far into the future. Bond release is always less than certain, being as it is contingent upon satisfactory performance of reclamation. The final proposed final regulations do not include the term "most appropriate technology and practices."

14.90 **Comment:** The proposed regulation covering bonding was carefully and cleverly crafted to appear reasonable, but in practical terms it is wholly unreasonable. I am aware of no surety company or financial lending institution in Alaska that would write a bond or letter of credit, or make a loan, collateralized or not, to a miner operating under the proposed bonding regulation. To do so would expose financial institutions to severe criticism by the FDIC because of the high but uncertain risk involved. Surety companies almost never write bonds unless they are assured that their risk is defined and limited and the person or company being bonded is financially capable of ensuring that the surety company's risk is nearly nonexistent.

Response: The provisions addressing release of the financial guarantee clearly place limits on the risk that a surety would be liable for. Operators can mange bond costs and risks to their sureties by developing comprehensive reclamation plans and performing reclamation concurrent with mine operations so as to lower ongoing reclamation liabilities.

14.91 **Comment:** 3809.592; 64 Fed Reg. at 6465 The proposed limitation of reduction in a bond by only 60% upon completion of surface reclamation is unacceptable and should be deleted. The BLM should consider the state provisions handling the reduction in bonding as the bond represents actual cost requirements to complete reclamation. As reclamation is completed, the bond should be released dollar for dollar with the activities or tasks that are satisfactorily completed. There should be no arbitrary "retention" for contingency or nonquantified or unanticipated purposes.

Response: Releasing financial guarantee on a dollar for dollar basis would create a somewhat more cumbersome process than relying on a fixed percentage. In addition, it would create a greater risk that toward the end of the reclamation process the financial guarantee would not be adequate to cover the cost of the remaining reclamation if the actual cost to complete earlier phases of reclamation exceeded the estimate. Whether to release 40, 60, or 80 percent of a financial guarantee is admittedly a somewhat imprecise decision. In the proposed final rule we chose 60 percent to assure that funds would be available at the end of the reclamation process. The arguments on both sides of the issue suggest to us that our proposal took a reasonable middle ground. Therefore we decided not to change the percentage of the financial guarantee we will release.

14.92 **Comment:** Section 3809.582 Criteria for release of financial guarantees should be stipulated in advance, in the approved plan of operations. Additional criteria must not be applied after Plan approval. Bonds or guarantees cannot be obtained if the criteria to be met for release are not reasonable and clearly defined in advance. The criteria should be specific to the project and clearly defined in the approved Plan of Operations.

Response: BLM will not release the financial guarantee until we determine reclamation is complete. The standard is the reclamation plan in the Notice or approved Plan of Operations. The sole criterion for judging whether you met the standard is the successful completion of reclamation.

14.93 **Comment:** Transfer of Operations and Impact on Financial Guarantee - 3809.593 If an operator transfers an operation and obligation to another operator, and that operator provides a satisfactory guarantee, the original operator's financial guarantee should be released in full. Just as important as establishing clear responsibility for reclamation for all portions of a transferred operation is the need to establish a clear mechanism for how the guarantees are to be released. This is not clear in this sub-part.

Response: We believe this section is clear. When BLM approves a new guarantee the previous guarantee may be released.

14.94 **Comment:** 3809.580 should be revised to ensure that an operator would be permitted to request BLM's approval for a decrease in financial guarantee if the estimated reclamation costs decrease as a result of a modification. Again, BLM should consider the state programs that specifically requires the guarantee to cover definable reclamation requirements.

Response: We agree. The proposed final regulations clarify the regulatory text by changing the word "increases" to "changes" and making conforming editorial changes.

14.95 **Comment:** The release of a financial guarantee need not be tied to a definitive release of liability for reclamation, but the liability for reclamation of at least Notice-level activity should have a definitive termination. British Columbia does it. Why can't BLM make such a decision for disturbances as simple as Notice-level activity? A rule addressing definitive termination of liability for Notice-level activities upon notice from BLM should be added as 3809.337.

Response: In all cases the operator remains responsible for the impacts of their operations regardless of whether BLM has released their financial guarantees. The financial guarantee is merely an enforcement tool and does not represent the limits of liability for reclamation.

14.96 **Comment:** 3809.593; 64 Fed. Reg. at 6465 If an operator transfers an operation and obligation to another operator and that operator provides a satisfactory guarantee, the original operator's financial guarantee should immediately be released in full. This is not clear in this subpart.

Response: BLM intends that to be the case and believes that the language in the proposed final regulations, which states, "Therefore, your financial guarantee must remain in effect until BLM determines that you are no longer responsible for all or part of the operation ," cannot be read to suggest that BLM would not promptly release the financial guarantee.

14.97 **Comment:** The incremental release provisions in proposed Section 591 must also be revised. BLM has proposed to reduce the financial guarantee "by not more than 60 percent of the total guarantee when the operator completes backfilling; regrading; establishment of drainage control; and stabilization and detoxification of leaching solutions, heaps, tailings, and similar facilities on that portion of the project area." 64 Fed. Reg. 6422, 6444. This provision is unjustified, and the example BLM relies on accentuates its error. BLM states that if an operator completed regrading 50 acres of a 100- acre project area, the operator could seek release of 60% of the financial guarantee

applicable to the 50 acres. Id. But the realities of reclamation suggest that regrading costs typically constitute closer to 90% of the total reclamation costs. BLM's selection of an arbitrary percentage ignores those issues; the provision should be revised to authorize a dollar-for -dollar release based on the amount of work performed.

Response: Releasing financial guarantee on a dollar-for-dollar basis would create a somewhat more cumbersome process than relying on a fixed percentage. In addition, it would create a greater risk that toward the end of the reclamation process the financial guarantee would not be adequate to cover the cost of the remaining reclamation if the actual cost to complete earlier phases of reclamation exceeded the estimate. Whether to release 40, 60, or 80% of a financial guarantee is admittedly a somewhat imprecise decision. In the proposed rule we chose 60% to assure that funds would be available at the end of the reclamation process. The arguments on both sides of the issue suggest to us that our proposal took a reasonable middle ground. Therefore we decided not to change the percentage of the financial guarantee we will release.

14.98 **Comment:** We strongly oppose the proposal to release the financial guarantee to the mining claimant after a claim is patented, per 3809.592, unless the patented surface has been satisfactorily reclaimed. A patent will fee-simple the surface and automatically default the responsibility of reclamation of the private surface to the state, which will have no financial guarantees of reclamation. BLM's financial guarantees should be assigned to the state on a pro rata basis because the claim may be partially patented or reclaimed.

Response: We agree that once land is patented BLM is no longer a party in interest with respect to the reclamation of the patented land. BLM would, however, retain portions of a financial guarantee whose purpose is to guarantee reclamation of the public lands. BLM would work with States to see if portions of the bond can be transferred to States to meet State bonding requirements. Because this is likely to vary among the States, we did not incorporate these suggestions into the proposed final regulations.

14.99 **Comment:** Liability after Release of Financial Guarantee. 3809.592(a) states that the release of the financial guarantee does not release the mining claimant or operator from responsibility for reclamation of the operations should reclamation fail to meet the standards of this subpart. An operator's liability with respect to the guarantee MUST terminate upon release of the guarantee. BLM should instead not release the financial guarantee until the reclamation is determined to meet the standards. In fact, this appears to be the intent of 3809.591, which establishes how BLM may reduce the amount of the financial guarantee. If all reclamation is complete and all applicable standards have been complied with, liability should be terminated. Nothing in FLPMA envisions that claimants could be held perpetually liable for complying with BLM regulations.

Response: We pointed out that the issue of residual responsibility for a project area after release of the financial guarantee has come up many times since 1980, and the current

rules do not address this. We continue to believe that this provision is needed to cover situations where, as we stated in the preamble to the proposed rule, "for example, a totally regraded and revegetated slope begins to slump or fail. If BLM could not require the operator or mining claimant to come back and fix the problem, unnecessary or undue degradation of public lands caused by the operator's activities would be a likely result." None of the arguments against this provision get at the issue of liability for problems that are clearly the result of mining operations and may show up later. Clearly, liability and release of the guarantee are separate issues. And even after release of a financial guarantee operators must be held liable for the consequences of their activities.

14.100 **Comment:** Release or Reduction of Financial Guarantee - 3809.590 The reference to "subsequent" for inspection of the reclamation as to when the operator will be notified whether reclamation is acceptable is inadequate. There should be a well-defined time frame within which BLM must notify an operator about the level of acceptance of reclamation. The intent is to determine as quickly as possible that the reclamation obligation has been met and to get the guarantee released as soon thereafter as possible.

Response: We chose to change the current rule that requires written waivers of joint inspections, and not to establish a time frame for when a joint inspection can occur. We intend to promptly inspect the reclaimed area, usually within 30 days. But when we inspect depends not only on our workload, but the operator's availability. Weather conditions may delay inspections. If we were to have a time frame in the rule, we would be establishing an inflexible process that, in the event of mutually agreed upon delays, could trigger unnecessary administrative burdens to justify the delay. Requiring the release within a finite number of days serves no public purpose because the effort to act within the time frame could lead to the inappropriate release of some guarantees or time-consuming appeals when we have legitimate reasons for delaying the release.

14.101 **Comment:** Length that Financial Guarantee must be Maintained - 3809.582 Standards that must be met before release of a guarantee are stipulated in the approved Plan of Operations. Any other standards should not apply. Bonds or guarantees cannot be obtained if the standards to be met for release are not clearly defined and reasonable. The standards should be specific to the project and clearly defined in the approved Plan of Operations, not generic SMCRA-like standards.

Response: The standard is the reclamation plan in the notice or approved Plan of Operations. The sole criterion for judging whether you met the standard is the successful completion of reclamation. BLM believes the regulation is clear and therefore we did not change language.

14.102 **Comment:** This section should also state that a bond will be released upon transfer of the property to a new owner with BLM approval and a replacement

bond.

Response: §3809.593 makes it clear that a bond can be released when you transfer your operation and an adequate financial guarantee has been accepted.

14.103 **Comment:** 3809.592(a) provides that the release of the financial guarantee does not release the mining claimant or operator from responsibility for reclamation of the operations should reclamation fail to meet the standards of this subpart. This provision is both inconsistent with other portions of the financial assurance rule and beyond BLM's authority to impose. Sections 3809.590 and .591 establish BLM's responsibility for determining whether reclamation has been successful and meets standards. Presumably, BLM will not release the posted financial guarantee unless the reclamation satisfies the standards under which the operations was approved. Though an operator may or may not be liable for future environmental problems under CERCLA, RCRA, or other federal or state legal authorities, FLPMA provides no basis for BLM to declare an operator perpetually liable. FLPMA is a regulatory, not remedial, statute. Under FLPMA, BLM has authority to impose regulatory requirements and standards and see that they are met. BLM has no FLPMA authority to go further and to declare perpetual liability. Indeed, even though BLM has some remedial and enforcement authorities delegated to it under CERCLA, those authorities may apply here but they do not include declarations of liability. Liability under CERCLA or other remedial authorities is determined in the end in courts, not by pronouncement in regulations.

Response: In the preamble to the proposed rule (See 64 FR 6444), BLM anticipated these types of objections to paragraph (a). We pointed out that the issue of residual responsibility for a project area after release of the financial guarantee has come up many times since 1980 and the current rules do not address this. We continue to believe that this provision is necessary to cover situations where as we stated in the preamble to the proposed rule, "for example, a totally regraded and revegetated slope begins to slump or fail. If BLM could not require the operator or mining claimant to come back and fix the problem, unnecessary or undue degradation of public lands caused by the operator's activities would be a likely result." None of the arguments against this provision get at the issue of liability for problems that are clearly the result of mining operations and may show up later. Clearly, liability and release of the guarantee are separate issues. And even after release of a financial guarantee the operator must be held liable for the consequences of his or her activities. Where it can be established an operator's activities has led to the problems, FLPMA provides authority for holding an operator responsible, regardless of how much time has elapsed. We included the provisions because not because we anticipated a large number of cases where we would direct an operator to come back and fix problems but because BLM must balance the operator's expectations with our duty to take steps to prevent unnecessary and undue degradation. Accordingly we did not incorporate the suggestion into the proposed final regulations.

14.104 **Comment:** As drafted, this subsection [3809.590] is open-ended and needs careful thought. In particular, the Department of the Interior has presented no compelling reason for providing inspection without the owner/operator as is the case in the existing 3809 regulations. The proposed regulations establish an indefinite/open-ended time line of: a "prompt" inspection, a later written decision without a time requirement, and then a 30-day public comment period at the end. Assuming standard time frames for a Department of the Interior decision, a simple decision would require more than 3 months as follows: day 1, application filed; day 5, a joint field exam scheduled 7 days later; day 13, joint field exam and proposed decision discussed; day 21, formal decision prepared and submitted to the state director; day 31 BLM decision signed; day 33, owner operator receive formal decision; day 35, notice published in local newspaper; day 64, someone requests an extension of 30 days to comment; day 70, BLM approves the request for 30 more days to comment; day 95, BLM renders a final decision. This hypothetical time line of 95 days to react to a request for relinquishment or reduction of a required financial guarantee as a result of the owner/operator and BLM regular on-the-ground mining operation is too long. The above time line is substantially longer to the extent the state director shifts decision making to BLM's Washington Office or to the Secretary of the Interior.

Response: We chose to change the current rule, which requires written waivers of joint inspections and not to establish a time frame for when a joint inspection can occur. We intend to promptly inspect the reclaimed area, usually within 30 days. But the time when we do it depends not only on our workload but on the availability of the operator. Weather conditions may delay inspections. If the rule included a time frame in the rule, we would be establishing an inflexible process that, in the event of mutually agreed upon delays, could trigger unnecessary administrative burdens to justify the delay. Requiring the release within a finite number of days serves could be counter productive because the effort to act within the time frame could lead to the inappropriate release of some guarantees or time consuming appeals when we have legitimate reasons for delaying the release.

14.105 **Comment:** Revise .590 to require BLM immediately to publish a notice of the request for reduction or release of the financial instruments and the date of the joint field inspection so that interested persons can attend.

Response: BLM intends this rule to permit an increase in public review of mining. The release of the financial guarantee is an important step in the mine closure process. Allowing the public to comment is also an important part of public participation, which should add value to BLM review, providing another check and balance on BLM. But the logistics of including the public on the formal inspection could result in many of the same problems that we considered in deciding not to adopt the proposal for "citizen inspections" in the proposed final regulations. Therefore we did not adopt this suggestion.

14.106 **Comment:** Delete .594(c) because it deals only with access. It is not a "mining operation" under the 3809 regulations because no federal minerals are involved. BLM has full authority to regulate access on public lands, but the appropriate requirements are in the right-of-way regulations. This proposed provision gives the impression that the Department of the Interior intends to regulate proper mining operations on land owned by Alaskan native corporations, patented mining claims, state and local governments, and the Forest Service if access to the mineral deposit is BLM's only action. This is not appropriate.

Response: We agree that the proposed provision was awkward and out of place. The proposed final regulations do not contain §3809.594(c)

14.107 **Comment:** Proposed 3809.592 is objectionable for similar reasons: it proposes that an operator's (or mining claimant's) liability would not terminate upon bond release. BLM justifies its proposal stating that "[i]f BLM could not require the operator or mining claimant to come back and fix the problem, unnecessary or undue degradation of public lands caused by the operator's activities would be a likely result." 64 Fed. Reg 6422,6444. FLPMA does not include liability provisions comparable to CERCLA; it does not grant BLM authority to hold operators (or mine claimants) perpetually liable. The concept of financial security release is predicted on the notion that when reclamation plan requirements and environmental standards or criteria have been met, the bond is released and the operator's obligations deemed fulfilled. Indeed, BLM's own statements reflect that fact: "BLM does not anticipate a large number of cases [in which it would require an operator or mining claimant to come back and fix a problem]...and, in any event must balance an operator's reasonable expectation of the finality of final financial guarantee release with BLM's [FLPMA] responsibility...." 64 Fed Reg. 6422, 6444. In light of BLM's own analysis, proposed Section 592 should be deleted.

Response: We pointed out that the issue of residual responsibility for a project area after release of the financial guarantee has come up many times since 1980, and the current rules do not address this. We continue to believe that this provision is needed to cover situations where as we stated in the preamble to the proposed rule, "for example, a totally regraded and revegetated slope begins to slump or fail. If BLM could not require the operator or mining claimant to come back and fix the problem, unnecessary or undue degradation of public lands caused by the operator's activities would be a likely result." None of the arguments against this provision get at the issue of liability for problems that are clearly the result of mining operations and may show up later. Clearly, liability and release of the guarantee are separate issues. And even after release of a financial guarantee the operator must be held liable for the consequences of his or her activities.

14.108 **Comment:** Delete .591(a). Obligations to meet water quality standards, heap

leach detoxification, and related water quality facilities are the responsibility of the state or EPA and are included in those authorizations. In Alaska, bonding for heap leach facilities, solid waste disposal, and tailings ponds are permitted and bonded under authority of the Alaska Department of Environmental Conservation (ADEC). The Alaska Department of Natural Resources approves dams for safety and regulates long-term dam maintenance and for reclamation of disturbed areas not covered by ADEC permits.

Response: This paragraph explains that the section applies only to financial guarantees and not to long-term trust funds. We believe it is appropriate and have retained it in the proposed final regulations. Regardless of the existence of bonds held by other entities, the BLM-held financial assurance must guarantee the performance of all reclamation covered by a Plan of Operations or a Notice.

14.109 **Comment:** Revise .591(b) to provide that 80% of the total financial guarantee will be released because only the cost for revegetation remains. This is because requiring 40% for only revegetation is not reasonable. The remaining 30% could be released on the basis of 10% when the first year seedling meets the standard specified in the approved reclamation plan and the last 10% when the revegetation standard is met as defined in the approved Plan of Operations. Note that the total financial guarantee included a cost for BLM to implement the approved reclamation plan in the event of default. Accordingly, the remaining 30% is well in excess of any third-party contract to complete revegetation.

Response: Whether to release 40, 60, or 80% of a financial guarantee is admittedly a somewhat imprecise decision. In the proposed rule we chose 60% to assure that funds would be available at the end of the reclamation process. The arguments on both sides of the issue suggest to us that our proposal took a reasonable middle ground. Therefore we decided not to change the percentage of the financial guarantee we will release.

14.110 **Comment:** I recommend that .591 be revised to establish the NEPA compliance process, as incorporated in the approved Plan of Operations, as the means to determine the amount of financial obligation to be released by BLM as each discrete phase of reclamation is completed.

Response: BLM decided not to adopt the suggestion to use the NEPA document to determine financial release amounts at discrete phases of reclamation. This process would overly complicate the NEPA document and probably extend the period of NEPA review before Plans are approved. It also would have the same problems of releasing the financial guarantee on a dollar-for basis as discussed above. Also, most plans undergo many changes, and BLM and the operator would have to review the financial guarantee release points as they review each modification. Such a process would be overly burdensome to BLM, states, and the operator.

14.111 **Comment:** Release of financial guarantees. Within what time limit will BLM publish the "notice of financial guarantee" in a local newspaper? We recommend that it be done no later than 30 calendar days after the date that reclamation is completed in the project area. Also, when the 30-day comment period has ended, BLM imposes no time limit imposed for returning the financial guarantee to the claimants, as written. We recommend that the regulation is written to specify that financial guarantee monies should also be returned no later than 30 days after the public comment period ends, assuming that BLM receives no significant comments that require followup action.

Response: BLM will publish a notice of financial guarantee after the inspection is complete and before we expect to release the financial guarantee. We will quickly review the public comments and determine whether they should affect the release of the guarantee. Upon making that decision, we will release the guarantee. As with all rules of this complexity, we will prepare guidance to assure that all field offices know how to implement each section of the final rule. Given the differences in the size and complexity of mines and the number of comments we might receive, we determined that the time to analyze comments will vary greatly. Therefore we choose not to limit the time for analyzing comments.

14.112 **Comment:** The term "promptly inspect" is too vague. What does "promptly" mean? The word promptly should be dropped and the sentence rewritten to say, "The operator will coordinate with BLM so that the reclaimed area is inspected by BLM as soon as reclamation operations are complete, and while equipment is still present at the site to complete additional reclamation work, if required." With no time limitation, the BLM inspection can take place at any time after cessation of operations. If BLM decides that more reclamation work is needed, the claimant may be forced to pay expensive or prohibitive mobilization costs to bring equipment back to the small, Notice-level project site.

Response: We chose to change the current rule, which requires written waivers of joint inspections, and not to establish a time frame for joint inspections. We intend to promptly inspect the reclaimed area, usually within 30 days. But when we inspect the area depends not only on our workload but on the operator's availability. Weather may delay inspections. If the rule had a time frame, we would be establishing an inflexible process that, in the event of mutually agreed upon delays, could trigger unneeded administrative burdens to justify the delay. Requiring the release within a finite number of days serves no public purpose because the quest to act within the time frame could lead to the inappropriate release of some guarantees or time-consuming appeals when we have legitimate reasons for delaying the release.

14.113 **Comment:** Sec. 3809.591(c): This section addresses release of the bond but not the long-term funding mechanism. There needs to be a section addressing the

release of long-term funding mechanisms if the anticipated problem never occurs or is eliminated before reclamation.

Response: We decided not to include language addressing the release of a long-term funding mechanism (trust fund) established under §3809.552 should the anticipated problem never occur or be eliminated before reclamation. If the problem does not occur or is eliminated, the BLM field manager may release these funds as part of the reclamation release process. It is difficult to foresee an instance where BLM approves a mine plan and requires a long-term funding mechanism that turns out to be unneeded. In fact, the only foreseeable reason for this to occur would be the result of a Plan of Operations modification that significantly changes the nature of the Plan. With each modification §3809.580 allows the operator to request a decrease in the amount of the financial guarantee. This provision would cover the long-term mechanism.

14.114 **Comment:** BLM should follow the states lead on this or there will be conflicts between the state and BLM over closure with no proposed authority designated for resolution. The bond needs to be redeemable and released by only one authority, the state, which administers both public and private lands. There should be NO public comment on release of financial guarantee. If BLM insists that public comment is needed for this component, then the comment period should be no longer than.

Response: BLM has the responsibility for assuring complete reclamation and that unnecessary or undue degradation on the public lands does not occur. Thus, BLM would remain involved in release of the financial guarantee. BLM would work closely with the States in this process. We believe that public comment is an important process. The proposed final regulations include a 30-day public comment period before final release of the financial guarantee.

14.115 **Comment:** The reference to "prompt" inspections of reclaimed areas and "subsequent" operator notification of release of financial guarantee is inadequate. The time frame within which BLM must notify an operator regarding reclamation acceptance should be well defined (in days). The objective should be to determine as quickly as possible that the reclamation obligation has been met and to release the guarantee as soon as possible thereafter. Public participation in the determination of release of a bond will delay the process. Other concerns include liability issues in allowing the public onto mine sites, issues of objectivity, and qualifications. We believe the "science" and objectivity in determining the appropriateness of bond release could be compromised by pressure from members of the public who are unqualified to make such determinations. BLM is the representative of the public (so is the state). That should be sufficient in providing "public" involvement.

Response: BLM intends this rule to permit an increase in public review of mining. The release of the financial guarantee is an important step in the mine closure process. Allowing the public to comment is also an important part of public participation, which should add value to the BLM review in providing another check and balance on BLM.

14.116 **Comment:** EPA strongly recommends that reclamation and closure requirements be amended to require that air emissions (fugitive) and water runoff from a closed unit meet Clean Air Act and Clean Water Act requirements in perpetuity. Chronic acid rock drainage problems at mines have clearly demonstrated that environmental degradation that takes place after formal reclamation can be significant. After a bond has been released, EPA is often the only agency that can address these issues using our Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) authorities. This approach is not cost effective. The regulations should require that the reclamation plan include a section on how the mining company will comply with environmental regulations after closure and into the future.

Response: See the preamble to the 3809 regulations. The performance requirements for reclamation include compliance with all applicable environmental laws and regulations. This includes the Clean Air Act and the Clean Water Act. Operations that were not in compliance with these acts upon completion of reclamation would not be eligible for final bond release.

14.117 **Comment:** Under Patented Mining Claims, "When your mining claim is patented, BLM will release the portion of the financial guarantee that applies to operations within the boundaries of the patented land." What is the purpose of this provision? If the land is patented and there is a problem, the United States. would still likely respond and spend money on a cleanup, so why is there not any bonding?

Response: Once the land is patented BLM is no longer a party in interest with regard to reclamation of these lands. The provision assumes that BLM would retain the portion of the financial guarantee whose purpose is to guarantee reclamation of the public lands portion of the project. Although EPA is correct that federal funds might be needed for a cleanup of the patented lands, this is not a reason for BLM retaining the financial guarantee under Subpart 3809. The patented land should immediately be treated in the same manner as any other nonfederal land.

14.118 **Comment:** Public Involvement. The public has a right to be involved in every step of the process of environmental assessment, environmental impacts statements, and bonding issues. The citizens of the immediate area are going to be the people affected long-term by these mines and should have a say in every decision making aspect. The people have a right to know the plans of a proposed mine and to help make the final decisions.

Response: The proposed final regulations allow many opportunities for public involvement. This includes a minimum 30-day public comment period on all Plans of Operations and public notice on final reclamation bond releases.

14.119 **Comment:** Page 45, Financial Guarantees. This alternative includes allowing the public to comment before final bond release. It is not stated how comments would be solicited or handled, the time frames for doing so, or the recourse for differences. Also, the value of this public comment is not discussed. The majority of the public is untrained in reclamation sciences. Isn't this best left to knowledgeable and trained professionals?

Response: BLM does not believe a lack of expertise will make the process meaningless. Members of the public could provide useful information to BLM. We view the opportunity for outside parties to comment as a positive. BLM will review public comments quickly and determine whether they should affect the release of the guarantee. Upon making that decision, we will release the guarantee. As with all rules of this complexity, BLM will prepare guidance to assure that all field offices know how to implement each section of the final rule. Given the differences in the size and complexity of mines and the number of comments BLM might receive, we determined that the time it will take to analyze comments will vary greatly. Therefore we choose not to limit the time to analyze comments.

14.120 **Comment:** Battle Mountain Gold suggests that BLM, through guidance, direct its offices to include a discussion of the methodology for financial guarantee calculations in NEPA documents and encourage public comment on that issue in accordance with other NEPA requirements and procedures.

Response: The proposed final regulations encourage public discussion of the financial guarantee as part of the EIS process. In addition, BLM will provide guidance to field offices.

14.121 **Comment:** Battle Mountain Gold understands the role of public participation in the NEPA process but questions whether a separate requirement for a financial guarantee amount would be productive. First, the calculation of the amount of financial guarantee is largely a mathematical exercise. There are standard sources of data and methodologies for calculating the cost of implementing specific reclamation measures. Public comment would not be helpful in that exercise. Second, many states have adopted regulatory guidance on bond calculations, including specifying particular sources for cost data, assumptions on overhead or administrative costs, etc. Again, individual comments on that process would not be particularly helpful or insightful. Third, Battle Mountain Gold is particularly concerned about how the proposed 30-day public comment period might affect

exploration. As a practical matter, 30 days may consist of a third of the time involved exploration or construction in some areas. Adding 30 days to the review period for an exploration project could have significantly adverse affects. Moreover, because BLM will have to review and respond to comments, the 30 days for public comments will translate into at least another 45-day delay, even on minor projects.

Response: See preamble to the 3809 regulations.

14.122 **Comment:** At the Elko public hearing, BLM acknowledged the need for timely release of bonds for small operations, particularly exploration projects, and noted that the provisions of proposed 3809.590–which required public comment on release of bonds for Notice-level activities–might not have correctly reflected the intent of the 3809 Task Force.

Response: The proposed final regulations do not include public comment on the release of financial guarantees held to conduct Notice-level activities.

14.123 **Comment:** 3809.411(d) requires BLM to accept comments on the amount of financial guarantee, and 3809.411 (a)(4)(vi) states BLM may not approve a Plan of Operations until it completes a review of such comments. These requirements will add extensive time to the BLM review process and increase BLM's workload without increasing the usefulness of BLM's surface management regulations. BLM and the states have expertise in setting financial assurance, and it is not likely that the general public will be able to add anything to that process. Moreover, if public comments are believed appropriate, they should be solicited in the same manner and according to the same time frame that apply to other issues in the NEPA process. The financial assurance amount should be established after the NEPA process has closed through an administrative process similar to the process used in California.

Response: The proposed regulations were changed in the proposed final rules to seek public comment on the entire Plan of Operations. This would allow public comment on the amount of the financial guarantee as part of the NEPA process. BLM will review comments on the bond along with all other comments before issuing a decision on the Plan of Operations.

14.124 **Comment:** BLM proposes a new requirement of a 30-day period of public comment on the bonding amounts, that is, financial guarantees for exploration disturbances even if the disturbance is under 5 acres. Such a 30-day public comment period will slow down the permitting process, thereby making it more expensive and more difficult to carry out mineral exploration, and this provision will have no environmental benefit. Higher costs simply translate to less money for

testing the ground and fewer people working.

Response: The proposed final regulations allow public comment on the entire Plan of Operations not just on the amount of the financial guarantee, this may occur as part of the NEPA process. BLM will review these comments along with all other comments before issuing decisions on Plans of Operations.

14.125 **Comment:** BLM should pay interest for any new or extended time frames dealing with refunding financial guarantees when it is clear the owner/operator has fully complied with the contract with BLM as specified in the approved Plan of Operations.

Response: BLM will promptly release a bond once the operator meets reclamation requirements and BLM inspects the operation to assure that reclamation is complete and a 30 day comment period occurs. No authority exists for paying interest on a financial assurance, nor would it be justified.

14.126 **Comment:** If the financial guarantee is properly considered in the NEPA process, no special additional comment period is needed. Adding more time to the already cumbersome and lengthy permitting decision process by BLM and the Forest Service is not consistent with NRC study (NRC 1999).

Response: Allowing comments during the NEPA process should not extend the time it takes to process a Plan of Operations. Likewise, the release of the financial guarantee does not affect permitting on-the-ground operations and therefore is not inconsistent with the NRC study.

14.127 **Comment:** The period for comment on bond releases should be extended to 60 days to give the public adequate time to review the facts, consult with experts, etc.

Response: The proposed final regulations continue to provide for a 30-day comment period. We believe this is adequate time.

Forfeiture

14.128 **Comment:** Proposed 3809.595 addresses the circumstances under which BLM "will" initiate forfeiture. Two important changes are needed. First, the section should state "BLM may initiate forfeiture" rather than "BLM will." There is no reason for the regulations to suggest a duty or obligation on BLM's part to initiate forfeiture without any recognition of the circumstances. Second, subsection (b) must be deleted because it suggests that BLM may initiate forfeiture for any violation of the terms of a Notice or Plan of Operations. Financial guarantees are just that–a guarantee of performance of reclamation. They are not an alternative

means of enforcing permit terms or penalizing an operator for noncompliance.

Response: The proposed final regulations changed the language from "will" to "may." We agree that the rule should not require BLM to hastily initiate forfeiture and paragraph (b) is not intended as penal provision. A violation of the terms of the approved Plan of Operations may cause unnecessary or undue degradation that requires immediate reclamation. In some cases, the operator may not be willing to reclaim the disturbance. For this reason, we declined to delete paragraph (b).

14.129 **Comment:** Section 3809.596, Forfeiture of Financial Guarantee. Federal procedures involving administrative law judges and the Interior Board of Land Appeals are considerably more protracted than state-level procedures. Will a BLM "stringency test" of the difference between federal-state forfeiture procedures tilt in the federal direction because of the stringency, when state procedures can more quickly resolve on-the-ground problems?

Response: The purpose of these regulations is to prevent unnecessary or undue degradation. This is always most quickly achieved if the involved parties can get together at an on-the-ground location. We hope that we will rarely initiate forfeiture procedures, and in all cases BLM and the state should try to work together to resolve the issues leading to forfeiture before we initiate such actions. But if the operator, state, and BLM cannot agree on a course of action, BLM must act on behalf of the Secretary of the Interior to prevent unnecessary or undue degradation. Therefore we decided to keep the proposed language in the proposed final regulations.

14.130 **Comment:** BLM's forfeiture provisions (proposed 3809.598) are also flawed in other ways; they would establish that operators and mine claimants are jointly and severally liable for costs where a financial guarantee is forfeited and insufficient to cover reclamation. BLM has no authority to propose such a requirement, and no one will provide for guarantees under this concept. Parties should be liable for no more than their share or interest in an operation. Otherwise, what is the purpose of calculating the bond in the first place? The industry should not be responsible for underwriting BLM's inability to properly calculate the proper bond amount. Moreover, the proposal disregards the realities of many mining operations for which land status can involve a multitude of different mining claimants. The joint and several liability provisions should be eliminated.

Response: BLM has revised the final rule (section 3809.116) to clarify the joint and several liability provisions. The final rule provides that mining claimants are responsible only for obligations arising from activities or conditions on their mining claims or millsites. As explained in the preamble to the rule, BLM believes that its final rule is authorized by law and is well-supported. BLM agrees that if reclamation is performed properly and bonds are sufficient, then the added liability provisions will not need to be implicated. But

if unperformed obligations that are not covered by a financial assurance remain, then it is helpful to have express liability provisions in BLM's rules.

14.131 **Comment:** States, not BLM, should be the agency to collect a forfeited guarantee, at BLM's request. BLM should establish this procedure with the state in an agreement at the outset of the permitting and bond-calculation process.

Response: Because BLM is the agency acting to protect federal lands, we believe it is proper that BLM serve as the collection agency. Conversely, if the state were to initiate forfeiture procedures for activities on nonfederal lands, it is appropriate for the state to act as the collection agency. BLM would work States to establish mutually acceptable procedures.

14.132 **Comment:** Initiation of Forfeiture of Financial Guarantee - 3809.596. A notice to surety should also be required as well as notice to the operator. The process to remedy default needs to allow an opportunity to fix the problem in a reasonable period of time, for BLM to review the corrective action thereafter, for the operator to respond to the review and improve on the remedy if possible, and only afterwards for notification of forfeiture to occur. This procedure would protect the operator from overzealous enforcement by the odd rogue adversarial regulator. Sometimes conditions of default are not necessarily a direct function of operator failure. The ability to remedy the default could be impaired by weather, seasonal constraints, and other conditions normally outside of the operator's control. Appropriate latitude to remedy default needs to be accommodated here.

Response: The proposed final regulations do require BLM to notify the surety when we issue a decision to initiate forfeiture. The regulations were modified to provide greater flexibility in initiating forfeiture actions. In addition, the State Director appeals process should provide immediate protection from overzealous enforcement.

14.133 **Comment:** 3809.597(b) Add ", including repayment to BLM of funds used to continue interim reclamation operations." (See the previous comments for subpart 3809.552.) Where the operator abandons the project area, BLM would have to use its own funds to pay for running the pumps to keep the ponds from overflowing. Therefore the regulations should state that BLM can recover those costs once the financial guarantee has been forfeited to BLM.

Response: The proposed final regulations make it clear that the estimate of the financial guarantee is calculated as though BLM were to contract for the reclamation work. We interpret this to mean any stabilizing and reclaiming of an operation when the operator is unable or unwilling to do so. In addition, the operator is liable for any costs that exceed the amount of the financial guarantee.

14.134 **Comment:** Define the term "owner/mining claimant" as used in the enforcement and forfeiture provisions in .596. This also should be linked to the term "project area" since there may be multiple ownerships of a mineral property that are only partially included within an application and subsequent BLM approved mining operation on the "project area." Assure that the final definition is applied by both the Forest Service and BLM in the same manner.

Response: We have defined mining claimant in the proposed final regulations. The mining claimant is normally the owner of the claim. Clearly BLM will not take enforcement action except when an activity affects public lands.